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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 889.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, APPELLANTS,

vs.

CORNELIUS C. WATTS, DABNEY C. T. DAVIS, Jr., JOHN WATTS, AND JAMES W. VROOM.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 21, 1919.

(24040)

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In the Court of Appeals of the District of Columbia.

No. 2584.

FRANKLIN K. LANE et al., Appellants,
vs.
CORNELIUS C. WATTS et al.

a Supreme Court of the District of Columbia.

In Equity. No. 28207.

CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., JOHN WATTS, and JAMES W. VROOM, Plaintiffs,
against
FRANKLIN K. LANE, Secretary of the Interior, and FREDERICK DENNETT, Commissioner of the General Land Office, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Bill of Complaint.*

Filed December 11, 1908.

In the Supreme Court of the District of Columbia.

In Equity. No. 28207.

CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., JOHN WATTS, and JAMES W. VROOM, Plaintiffs,
against
JAMES R. GARFIELD, Secretary of the Interior, and FREDERICK DENNETT, Commissioner of the General Land Office, Defendants.

To the Supreme Court of the District of Columbia, holding an Equity Court:

Your Orators complain and say:

That Cornelius C. Watts and Dabney C. T. Davis, Jr. are citizens of the State of West Virginia, residing at Charleston in said State;

John Watts is a citizen of Colorado residing at Denver in said State, and James W. Vroom is a citizen of the State of New York, residing in the City of New York in said State, and that your orators bring this, their bill of complaint, against James R. Garfield, a citizen of Ohio, residing in the District of Columbia, and Frederick Dennett, a citizen of the State of North Dakota, residing in the District of Columbia, defendants.

1. That, at the time of the filing of this bill, the defendant, James R. Garfield, was and he still is Secretary of the Interior and as such has charge of the administration of the laws of the United States relating to the public lands, and that, at the time of the filing of this bill, the defendant, Frederick Dennett was and he still is the Commissioner of the General Land Office and as such has charge under the Secretary of the Interior of the administration of such laws.

2

2. That the Republic of Mexico ceded to the United States by the Treaty of Guadalupe Hidalgo of 1848 (9 Stat., 925) and by the Treaty of Mesilla of 1854 (10 Stat., 1035), the territory now embraced within the boundaries of the Territories of New Mexico and Arizona, including the lands included in the Baca Location, No. 3, hereinafter described, which was formerly situated in Santa Ana County, New Mexico, later in Pima, and now in Santa Cruz, Arizona, and which is one of a series of five locations granted by the United States to the heirs of Luis Maria Baca in exchange for the grant of Las Vegas Grandes, which had been granted by Mexico to Luis Maria Baca.

3. That, by an Act of Congress entitled "An Act to establish the offices of surveyor general of New Mexico * * * and for other purposes," approved July 22, 1854, (10 Stat. 308), the Congress established the office of surveyor general for New Mexico, and, by Section 8 provided "That it shall be the duty of the surveyor general, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character and extent of all claims to land under the laws, usages and customs of Spain and Mexico," and by Section 9 "That full power and authority are hereby given the Secretary of the Interior to issue all needful rules and regulations for fully carrying into effect the several provisions of this act."

3

4. That pursuant to said act the Secretary of the Interior, on August 25, 1854 (Public Domain, 394-398) issued to the said surveyor general the following rules and regulations:

"It is obligatory on the government of the United States to deal with the private land titles, and the pueblos, precisely as Mexico would have done had the sovereignty not changed. We are bound to recognize all titles as she would have done—to go that far and no farther. This is the principle you will bear in mind in acting upon these important concerns.

"Your first session will be held at Santa Fe. * * * You will commence your session by giving proper public notice of the same, in a newspaper of the largest circulation, in the English and Spanish Languages, will make known your readiness to receive notices and

testimony in support of the land claims of individuals derived before the change of government. You will require claimants in every case—and give public notice to that effect—to file a written notice setting forth the name of the present claimant; name of the original claimant; nature of the claim, whether inchoate or perfect; its date;

4 from what authority the original title was derived, with a reference to the evidence of the power and authority under which the granting officer may have acted; quantity claimed; locality, notice and extent of conflicting claims, if any, with a reference to the documentary evidence and testimony relied upon to establish the claims, and to show a transfer of right from the original grantee to the present claimant.

"You will also require of every claimant an authenticated plat of survey, if a survey has been executed, or other evidence, showing the precise locality and extent of the tract claimed. This is indispensable in order to avoid any doubt hereafter in reserving from sale, as contemplated by law, the particular tract or parcel of land for which a claim may be duly filed, or in communicating the title to the same hereafter, in the event of final confirmation."

5. That, pursuant to the said Act of Congress and the rules and regulations issued thereunder, the surveyor general of New Mexico, on January 18, 1855, duly issued and caused to be published the required notice to all grant claimants.

6. That said Section 8 of said Act of Congress further provided that "He (the surveyor general) shall make a full report on all such claims as originated before the cession of the territory to the United States by the Treaty of Guadalupe Hidalgo of 1848, denoting the various grades of title, with his decision as to the validity or invalidity of the same under the laws, usages and customs of the coun-

5 try before its cession to the United States, * * * Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm bona fide grants, and give full effect to the Treaty of 1848 between the United States and Mexico, and until the final action on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government."

7. That, by an Act of Congress, approved August 4, 1854, (10 Stat., 575), the provisions of said act of July 22, 1854, were extended to the territory acquired by the Treaty of Mesilla of 1854, which was incorporated with the Territory of New Mexico; and, that, by the Sundry Civil Appropriation Act of July 15, 1870, c. 292 (16 Stat., 304), it was enacted that the surveyor general of the territory of Arizona, as to lands in that Territory, should have all the powers conferred and perform all the duties enjoined upon the surveyor general of New Mexico by said act of July 22, 1854; and that his report should be laid before Congress, for such action thereon as should be deemed just and proper.

8. That, under the provisions of said act of July 22, 1854, the heirs of Luis Maria Cabeza de Baca, on August 31, 1859, by John S. Watts, their attorney, presented to the surveyor general of New

Mexico their claim to a Mexican land grant called "Las Vegas Grandes," and petitioned for the confirmation of the same; that at about the same time the town of Las Vegas filed its petition
6 for the confirmation to it of the same tract of land; that thereupon the said surveyor general, on December 18, 1858, reported to the Congress, as follows:

"It is firmly believed that the land embraced in either of the two grants is lawfully separated from the public domain and entirely beyond the disposition of the general government, and that in the absence of one the other would be a good and valid grant, but as this office has no power to decide between conflicting parties, they are referred to the proper tribunals of the country for the adjudication of their respective claims, and the case is hereby referred to Congress, through the proper channels, for its action in the premises."

9. That, on May 19, 1860, the Senate Committee on Private Land Claims made the following report respecting these two alleged grants of land:

"Amongst the claims embraced, however, in the second report, and recommended for confirmation, are two which cover the same tract of land, and are embraced in one number, to-wit, No. 20.

"To this tract the two claimants are, first, the heirs of Luis Maria Baca who claim under a grant made by the provincial department of Durango to said Baca and his seventeen sons on May 29, 1821, which grant was ratified and confirmed on February 1, 1825, by the departmental assembly of New Mexico. This grant was in
7 fee and is a genuine and valid title. Second, the town of Las Fegas or Las Vegas. This town claims under a grant made on March 25, 1835, to Juan de Dios Mase and twenty-seven others by the territorial deputation on a petition which represented the land to be public land, and the petitioners were put in possession. This land has been divided out and several hundred families are located upon it.

"The surveyor general having none but ministerial duties to perform, has recommended the confirmation of both of these titles, leaving the respective claimants the right of adjusting their conflicting claims in the courts; but Congress has other duties imposed on it, and is bound to legislate in such manner as to prevent, if possible, so destructive a result as the plunging of an entire settlement of families into litigation at the imminent hazard of being turned out of their homes, or made to purchase a second time from a private owner lands for which they paid their government a full equivalent in the labor, risk and exposure by which they have converted a wilderness surrounded by hostile savages into a civilized and thriving settlement, and this can be done with little loss or cost to the Government.

"The claimants under the title to Baca, also represented by Judge Watts as their counsel, have expressed a willingness to waive their older title in favor of the settlers if allowed to enter an
8 equivalent quantity of land elsewhere within the Territory; and your Committee cannot doubt that Congress will cheerfully accept the proposal, which, indeed, would undoubtedly have

been acceded to by Mexico if the Territory had remained hers, and to whose rights and duties the United States have succeeded.

10. That by an act entitled "An Act to Confirm certain private land claims in the Territory of New Mexico" approved June 21, 1860 (12 Stat., 71) the Congress enacted among other things, by Section 3:

"That the private land claims in the Territory of New Mexico, as recommended for confirmation by the Surveyor General in his report * * * and numbered from twenty (being the two grants of 'Las Vegas Grandes') to thirty-eight, both inclusive, be, and the same are hereby, confirmed." It was further enacted by Section 6:

"That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the same tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number; and it shall be the duty of the Surveyor General of New Mexico to make survey and location of the land so selected by the said heirs of Baca when thereunto required by them, provided, however, that the right hereby granted shall continue in force
9 for three years from the passage of this act, and no longer."

11. That pursuant to said act of June 21, 1860, the Commissioner of the General Land Office on or about July 26, 1860, issued to the Surveyor General of New Mexico the following instructions:

"SIR: It will be your duty to first survey and separate from the public land such of the pueblos or individual confirmed claims as now fall within the range of the public surveys.

"In this connection I have to draw your special attention to the 6th section of the said act of June 21, 1860; that section refers to the claim of the Heirs of Luis Maria Baca. * * * To give this law timely effect, you will give priority in surveying private claims to this claim. * * * You will proceed to have the exterior lines of "Las Vegas Town claim property run and connected with the lines of public surveys, the exact area of the Las Vegas Town tract having been thus ascertained, the right will accrue to the Baca claimants to select a quantity equal to the area of the tract elsewhere in New Mexico of vacant land, not mineral, in square bodies not exceeding five in number. You will furnish them with a certificate transmitting at the same time a duplicate to this office, of their right
10 and the area they are to select in five square parcels. Should they select in square bodies according to the existing line of the surveys, the matter may be properly disposed of by their application duly endorsed and signed with your certificate designating the parts selected by legal divisions or sub-divisions, and so selected as to form five separate bodies in square form. Then the certificate thus endorsed is to be noted on the records of the Register and Receiver of Santa Fe and sent on here by those officers for approval. Should the Baca claimants select outside of the existing surveys, they must give such distinct descriptions and connection with natural objects

in their applications to be filed in your office, as will enable the Deputy Surveyor when he may reach the vicinity of such selections in the regular progress of the surveys, to have the selections adjusted as near as may be to the lines of the public surveys, which may hereafter be established in the region of those selections.

"In either case the final conditions of the certificate to this office, must be accompanied by a statement from yourself and Register and Receiver that the land is vacant and not mineral."

12. That on or about December 8, 1860, the Surveyor General of New Mexico notified Tomas Cabeza de'Baca as the legal representative of the heirs of Luis Maria Baca deceased, that the grant to the Town of Las Vegas had been surveyed and found to consist
11 of 496,446.96 acres; and that under the act of June 21, 1860, the heirs of Luis Maria Baca were entitled to select in not more than five square bodies an amount of land equal to said area, upon any of the unoccupied lands, not mineral, of New Mexico, and that the Surveyor General was authorized to survey and locate the same, and that his office was ready to cooperate with said Tomas Cabeza de'Baca and receive his application for the location of the lands granted by the Government.

13. That thereupon and on or about June 17, 1863, pursuant to said notice and under said act of June 21, 1860, the heirs of Luis Maria Baca (styled in the application Luis Maria Cabeza de Baca) by John S. Watts, their attorney, duly made to the Surveyor General of New Mexico the following application to locate Baca Float No. 3:

"SANTA FE, NEW MEXICO, *June* 17, 1863.

John A. Clark, Surveyor General, Santa Fe, New Mexico:

I, John S. Watts, the attorney of the heirs of Don Luis Maria Cabeza de Baca, have this day selected as one of the five locations confirmed to said heirs under the 6th section of the act of Congress approved June 21st, 1860, the following tract, to-wit.—Commencing at a point one mile and a half from the base of the Solero Mountain in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point
12 west twelve miles thirty-six chains and forty-four links, thence south twelve miles thirty-six chains and forty-four links, thence east twelve miles thirty-six chains and forty-four links, thence north twelve miles thirty-six chains and forty-four links, to the place of beginning, the same being situate in that portion of New Mexico now included by act of Congress approved February 24, 1863, in the Territory of Arizona—said tract of land is entirely vacant, unclaimed by anyone, and is not mineral to my knowledge.

JOHN S. WATTS,

Attorney for the Heirs of Luis Maria Cabeza de Baca."

14. That on the same day, June 17, 1863, the Surveyor General of New Mexico made the following certificate to the Commissioner of the General Land Office:

"SURVEYOR GENERAL'S OFFICE,
SANTA FE, NEW MEXICO, *June* 17, 1863.

I, John A. Clark, Surveyor General of New Mexico, do hereby certify that on this day John S. Watts, Esq., in behalf of the heirs of Luis Maria Cabeza de Baca, filed in this office an application in the words and figures following, viz.:

13 SANTA FE, NEW MEXICO, *June* 17, 1863.

John A. Clark, Surveyor General, Santa Fe, New Mexico:

I, John S. Watts, the attorney for the heirs of Don Luis Maria Cabeza de Baca, have this day selected as one of the five locations confirmed to said heirs under the 6th section of the act of Congress approved June 21st, 1860, the following tract, to-wit: Commencing at a point one mile and a half from the base of the Salero mountain in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles thirty-six chains and forty-four links, thence south twelve miles thirty-six chains and forty-four links, thence east twelve miles thirty-six chains and forty-four links, thence north twelve miles thirty-six chains and forty-four links, to the place of beginning, the same being situate in that portion of New Mexico now included by act of Congress approved February 24, 1863, in the Territory of Arizona, said tract of land is entirely vacant, unclaimed by anyone, and is not mineral to my knowledge.

(Signed) JOHN S. WATTS,
Attorney for the Heirs of Luis Maria Cabeza de Baca.

14 And I further certify that, the said tract of land being the one-fifth part of the private claim confirmed to the said heirs, contains ninety-nine thousand two hundred and eighty-nine acres and thirty-nine hundredths of an acre, and that this location is the third of the series (application to locate the same, filed in this office October 31, 1862—dated October 30, 1862—having been withdrawn—See letter of Commissioner of the General Land Office dated February 5, 1863) and, with the three locations, numbered one, two and four heretofore made, included four-fifths of the said private claim confirmed to the heirs of Luis Maria Cabeza de Baca, by the act of Congress approved June 21, 1860.—Said location is hereby approved.

In witness whereof I have hereto set my hand this 17th day of June, 1863.

JOHN A. CLARK,
Surveyor General."

That on June 18, 1863, the said Surveyor General forwarded the foregoing certificate with his approval to the Commissioner of the General Land Office, with the following letter:

15 "SURVEYOR GENERAL'S OFFICE,
SANTA FE, NEW MEXICO, *June* 18, 1865.

Honl. J. M. Edmunds, Comm'r of General Land Office, Washington City, D. C.

SIR: I enclose herewith copy of the application and certificate of location No. 3, of the private claim confirmed to the heirs of Luis Maria Cabeza de Baca.

As this location is far beyond any of the public surveys, I have not deemed it necessary to procure any certificate from the Register and Receiver of the Land Office, as from the nature of the case, they cannot officially know anything concerning it.

I am respectfully your
Obt. servt.,

JOHN A. CLARK,
Surveyor General."

15. That, on July 18, 1863, the Commissioner of the General Land Office sent the Surveyor General of New Mexico the following letter:

"John A. Clark, Esq., Surveyor General, Santa Fe, New Mexico.

SIR: I have to acknowledge the receipt of your letter of
16 the 18th ultimo enclosing copy of the application of John S. Watts, Esq., in behalf of the heirs of Luis Maria Cabeza de Baca, dated June 17, 1863, filed in your office on the same day, together with your certificate to the effect that the application to locate one-fifth of the private claim confirmed to said heirs being within the limits of New Mexico as they existed at the date of the confirmation, viz.: June 21, 1860, but actually situated within the present Territory of Arizona, is the 3rd location of the series and with those numbered 1, 2, & 4 heretofore made constitute four-fifths of the said private claims.

Your approval of the location under consideration is found to have ignored the imperative condition that the lands selected at the base of Salero Mountain now included by act of Congress approved February 24, 1863, in the Territory of Arizona, is vacant land and not mineral. Before the application of Location No. 3, of the heirs aforesaid can be approved, by this office, it is necessary that our instructions of the 26th July, 1860, should be complied with by furnishing a statement from yourself and Register and Receiver that the land thus selected and embracing one-fifth of the claim or 99.289 39/100 acres is vacant and not mineral.

I am very respectfully,
Your obt. servt.,

J. M. EDMUNDS,
Commissioner."

17 That on April 2, 1863, the Surveyor General of New Mexico sent to the Commissioner of the General Land Office, the following letter:

"APRIL 2D, 1864.

Hon. J. M. Edmunds, Comm'r of the General Land Office, Washington, D. C.

SIR: I have to acknowledge the receipt on my return to Santa Fe from Arizona, of your letter of 18th July, 1863. In reply I have to state that there is no evidence in the office of the Surveyor General of New Mexico, that the tract of land located by the heirs of Luis Maria Cabeza de Baca, designated as location No. three, contains any mineral, or that it is occupied. There have been no public surveys made in the neighborhood of said tract, and there is no record of, or concerning the land in question in the Surveyor General's office, nor, as I believe—in the office of the Register or Receiver of the Land Office of New Mexico.

As I am personally unacquainted with that region of country, I cannot certify that the land in question is "vacant and not mineral" or otherwise. Those facts can only be determined by actual examination and survey.

I am very respectfully,
Your obdt. servt.,

JOHN A. CLARK,
Surveyor Gen'l, New Mexico."

18 That on March 25, 1864, the Register and Receiver of the United States Land Office at Santa Fe, New Mexico, made the following certificates:

"UNITED STATES LAND OFFICE,
SANTA FE, NEW MEXICO, *March* 25, 1864.

"I hereby certify that the land contained in the description of the foregoing application of John S. Watts, Esq., Attorney for the heirs of Luis Maria Cabeza de Baca, are vacant and not mineral so far as the records of this office show (not having been surveyed).

JOHN GREINER, *Receiver.*"

"I hereby certify that the lands embraced in the description of the foregoing application of John S. Watts, Esq., Attorney for the heirs of Luis Maria Cabeza de Baca, are not surveyed, and from all information in this office, are vacant and not mineral.

J. HOUGHTON, *Register.*"

16. That thereafter and on or about April 9, 1864, the Surveyor General of New Mexico, having been required by the heirs of Luis Maria Baca to survey the tract of land located by them, designated as location No. 3, the Commissioner of the General Land Office issued the following instructions:

19 "GENERAL LAND OFFICE, *April 9th*, 1864.

Levi Bashford, Esq., Surveyor General, Tucson, Arizona.

SIR: By an examination of the papers herewith inclosed relating to the 3d of the series of the Luis Maria Baca grants confirmed by

the 6th Section of an Act of Congress approved June 21, 1869, you will perceive that the location of the one-fifth part of said grant as set forth by the claimants has been approved by the Surveyor General of New Mexico, under whose jurisdiction the application properly came at the date of the approval.

The law of 1860 referred to provides that in lieu — the "Las Vegas" claim the heirs of Baca may select an equal quantity (496,446 96/100 acres) of vacant land not mineral "to be located by them in square bodies, not exceeding five in number," and makes it the duty of the Surveyor General "to make survey and location of the lands, so selected" when required by said heirs. The act of June 3d 1862 requires all such grants to be surveyed at the expense of the claimants. In order to avoid delay you are hereby authorized whenever said claimants shall pay or secure to be paid to you a sum sufficient to liquidate all the expenses incident thereto, office work included, to contract with a competent Deputy Surveyor and have the
20 claim numbered 3 of the series surveyed as described in the inclosed application. Transcripts of the field notes and plats certified in accordance with the requirements of the law will be transmitted to this office and will constitute the muniments of title, the law not requiring the issue of Patents on these claims.

In your instructions to the Deputy Surveyor you will direct as follows: At the beginning point which will be at the North east corner of the claim a stone must be firmly planted in the earth, leaving not less than eighteen inches projecting above the surface of the ground. Upon the west face of this stone the following inscription will be durably cut, to-wit—

(N. E. cor.)
(Baca)
(CL. No. 3)

at the distance of each mile on the boundary line, from the beginning point a stone must be set or a post and mound erected, and said posts or stones numbered consecutively from the beginning point. At each of the other three corner-stones must be securely planted and durably marked respectively as follows:

(N. W.)	(S. W.)	(S. E.)
(cor.)	(cor.)	(cor.)

The affidavits of the Deputy attached to the field notes must set forth that the corners have been perpetuated and marked in accordance with the above directions.

Very respectfully &c.,

J. M. EDMUNDS, *Com'r.*"

21 The Commissioner then quoted the certificate of the Surveyor General of New Mexico, dated June 17, 1863, and hereinbefore set out in paragraph 14; and following this quotation, made the following order:

"GENERAL LAND OFFICE, *April* 9, 1864.

Levi Bashford, Esq., Surveyor General, Tucson, Arizona.

SIR: The foregoing statement and the certificate of Surveyor General Clark having been submitted to this Department and having undergone a careful examination, the location being approved by him to perfect title under the authority of the act approved June 21, 1860, application for survey having been made. Instructions (copy herewith attached) have been given to Surveyor General Levi Bashford of Arizona in which Territory the lands located now are, to run the lines indicated and forward complete survey and plat to be placed on file for future reference as required by law.

J. M. EDMUNDS, *Com'r.*"

17. That pursuant to the hereinbefore recited order of April 9, 1864, of the Commissioner of the General Land Office, an attempt was made to survey the tract of land located by the heirs of
22 Luis Maria Baca, designated as location No. 3, but upon information & belief the surveyors were killed by hostile Indians while engaged in the work of said survey and no survey was ever returned.

18. That thereafter, though thereunto frequently required and requested by the heirs and representatives of Luis Maria Baca, the Commissioner of the General Land Office failed and refused to continue, or have made, the said survey ordered by the Commissioner of the General Land Office on April 9, 1864, and persisted in said failure and refusal until, on or about June 17, 1905, on which date the Commissioner of the General Land Office, by an official order of the said date, authorized and directed the Surveyor General of Arizona, to cause a survey to be made and that pursuant to said order of the Commissioner and under contract No. 136, dated June 17, 1905, one Phillip Contzen was authorized and required to run the lines indicated in the application to locate Float No. 3 hereinbefore set out, so as to adjust the lines, as near as might be, to the lines of the public surveys.

That pursuant to said order and said contract, the said Phillip Contzen and others made the said survey of said lines and forwarded the same to the Surveyor General of Arizona; that on or about November 23, 1906, the Surveyor General of Arizona made the following endorsement upon said plat of said survey: "This plat of Baca Float No. 3, private land claim, situated in the Santa Cruz County in the Territory of Arizona, is strictly conformable to the
23 field notes of survey thereof executed from November 3 to December 23, 1905, by Philip Contzen, Deputy Surveyor, under his contract No. 136, dated June 17, 1905, which have been examined, approved and filed in this office. U. S. Surveyor General's Office, Phœnix, Arizona, November 23, 1906. Frank S. Ingalls, U. S. Surv. Gen'l"; and that the said plat and survey have been examined and found correct by the Commissioner of the General Land Office.

19. That on or about January 12, 1905, the Commissioner of the

General Land Office, disregarding the decision and order of the then Commissioner of the Land Office, of April 9, 1864, herein set forth, instructed the Surveyor General of Arizona that the duty of investigating and determining, in the first instance at least, the character of the lands involved under Baca Float No. 3, rested upon said Surveyor General and that such investigation should be conducted and determination made as the work of survey progressed in the field; and that the duty of determining what portion of the lands covered by the Baca location was occupied or claimed under private grants at the time of the location of the Float in 1863, also devolved upon him, and such lands as said Surveyor General found were known to be mineral or occupied or claimed on June 17, 1863, were to be excepted from the survey of the Baca claim. That pursuant to such instructions, the Surveyor General, in December 1906, forwarded the survey and plat hereinbefore mentioned to the Commissioner
24 of the Land Office with a report accompanied by the alleged information which he had gathered, and a recommendation that the location of Baca Float No. 3, made as hereinbefore stated, June 17, 1863, be entirely rejected.

20. That on or about May 13, 1907, contrary to law and without jurisdiction so to do, and disregarding the order of his predecessor of April 9, 1864, hereinbefore referred to, ordering the survey of the said tract of land, the Commissioner of the General Land Office rendered a decision ordering a hearing before the Surveyor General of Arizona, to determine whether the said lands were, at the time of said location, vacant and non-mineral.

21. That, on or about June 2, 1908, the First Assistant Secretary of the Interior, in a decision upon an appeal from the said decision of the Commissioner of the General Land Office, and contrary to law and without jurisdiction, and disregarding the order of April 9, 1864, of the then Commissioner of the General Land Office approving said location, affirmed the decision of the Commissioner of the General Land Office in so far as the same remanded the case for a hearing before the Surveyor-General of Arizona.

22. That, on or about October 10, 1908, a motion to review the said decision of the Secretary of the Interior of June 2, 1908, was duly made; that said motion was held under advisement until about December 5, 1908, when the motion was denied, thereby finally disposing of the matter.

23. That, by the acts hereinbefore recited, to and including the decision and order of J. M. Edmunds, the then Com-
25 missioner of the General Land Office, of April 9, 1864, ordering a survey of the tract of land located by the heirs of Luis Maria Cabeza de Baca, designated as Location No. 3, title to such lands vested in fee in the heirs of Luis Maria Cabeza de Baca and your orators as successors in title, as stated, so that thereafter it was not within the power of the then Secretary of the Interior, or any of his successors in office, or of any officer of the Government of the United States, effectively to revoke such approval or to revoke or annul the orders, rulings and adjudications made in that behalf by the said J. M. Edmunds, as such Commissioner, or to injuriously affect the

rights of the heirs of Luis Maria Cabeza de Baca or of their successors in title, or of your orators, to the lands aforesaid.

24. That, as your orators are informed and believe and therefore aver, the tract of land located by the heirs of Luis Maria Cabeza de Baca, known as Location No. 3, has always been treated by the Land Department as thereby segregated from the public domain and not open to entry or settlement, and has for many years been marked upon the maps issued under the authority of the General Land Office as Private Land Grant, as more specifically appears from the map of the Territory of Arizona of 1903.

25. That, on or about February 2, 1899, one Henry Ohm of Calabasas, Pima County, Arizona, made application to make a homestead entry upon the north half and the southeast quarter of the southeast quarter and the northeast quarter of the southwest quarter of
26 section 9, in Township 22, south of Range 13 east, containing one hundred and sixty (160) acres, and lying within the lines of the tract of land located by the heirs of Luis Maria Cabeza de Baca, known as Location No. 3, and being upon lands claimed to be subject to entry by the Land Office at Phœnix, Arizona.

26. That, on or about May 14, 1908, Lyman W. Wakefield, then Register and Receiver of the United States Land Office at Phœnix, Arizona, forwarded the said homestead application of Henry Ohm to the Commissioner of the General Land Office for instructions as to allowing the claimant to proceed with the making of final proofs, stating that the said tract upon which the said Ohm sought to make homestead entry was included in the tract of land located by the heirs of Luis Maria Cabeza de Baca, known as location No. 3, reserved by Letter G of July 28, 1899.

27. That, on or about June 15, 1908, and within the time within which your orators were entitled to move to review the decision of the Secretary of the Interior of June 2, 1908, hereinbefore referred to, one S. V. Proudfit, as Acting Commissioner of the General Land Office, instructed the said Register and Receiver of the United States Land Office at Phœnix, Arizona, to allow the said Henry Ohm to proceed with the making of said proof and to issue final certificates on the entry if such proof was found satisfactory; stating, however, that final action on such entry would not be taken by the Commissioner of the General Land Office "until the Baca Float decision had become final."

28. That, notwithstanding that each and every of said
27 officers well knew the pendency of the proceedings in the Interior Department, hereinbefore referred to, to establish your orators' rights to the tract of land located by the heirs of Luis Maria Cabeza de Baca, known as Location No. 3, the said officers proceeded, as hereinbefore stated with reference to the homestead application of said Henry Ohm, without giving your orators any notice of their proposed action, or of such action when taken, nor any opportunity to be heard in regard thereto.

29. That your orators only learned, on or about November 26, 1906, the foregoing recited facts in regard to the homestead entry of said Henry Ohm through inquiries instituted by your orators im-

mediately upon receiving a communication from a correspondent in Arizona, who had incidentally heard of the proceedings.

30. That there are many other entries upon the tract of land located by the heirs of Luis Maria Cabeza de Baca designated as Location No. 3, similar to that of said Henry Ohm and in a like situation as to their present status.

31. That the execution of the instructions hereinbefore referred to, of June 15, 1908, with reference to the homestead entry of said Henry Ohm and the other entries referred to, will throw a cloud upon the title of your orators to the lands aforesaid, and is likely to cause many persons to attempt to settle upon the said lands and to enter same in the Land Department of the United States, and that your orators will be unable to remove such persons from said lands or to quiet their title thereto as against them without a mul-
28 tiplicity of suits, and that therefore your orators are entitled in this Court to an order enjoining and restraining the defendants, as such Secretary of the Interior and as Commissioner of the General Land Office, and the subordinate officers of the Land Department of the United States, from in any way carrying said last mentioned instructions, orders and rulings into effect, and from permitting any entries upon said lands or holding the same open to entry, and from in any way interfering with or embarrassing your orators in their title or ownership to the lands aforesaid.

32. That, the defendants intended and proposed, and do now intend and propose, in professed accordance with the laws relating to the public lands of the United States, to convey a pretended title in fee simple to and in a large portion of the tract of land located by the heirs of Luis Maria Cabeza de Baca, known as Location No. 3, to the said Henry Ohm, and to other persons who have or may settle upon the said lands and make entries thereof in the Land Department of the United States, to the end that the said lands so settled and entered may become the property of such persons and be permanently disposed of, and the title of the said lands be permanently and irrevocably vested in such persons.

33. That, on or about May 1, 1864, the heirs of Luis Maria Cabeza de Baca conveyed the tract of land located by them, known as Location No. 3, by a good and sufficient deed to John S. Watts, and that by mesne conveyances your orators have succeeded to the title of the said Watts in said lands.

34. Your orators further aver that they intend to proceed
29 with due diligence to enforce in law and in equity their rights as owners of all the lands contained in the description of the tract of land located by the heirs of Luis Maria Cabeza de Baca, known as Location No. 3.

35. That, as your orators are informed and believe and therefore aver, the tract of land located by the heirs of Luis Maria Cabeza de Baca, known as Location No. 3, is of great value, to-wit, of the value of more than One hundred thousand dollars ($100,000).

36. Your orators further aver that they have no adequate remedy at law and are remediless except in equity.

37. That your orators aver that no other or previous application has been made for the relief asked for in this bill.

Wherefore Your Orators pray:

1. That Your Honors grant unto your orators your writ of injunction commanding the defendants, James R. Garfield and Frederick Dennett, and each of them, and their successors in office, and all persons claiming to act under the authority, direction or control of either of them, absolutely to desist and refrain from proceeding in any manner with the proceedings in the matter of the alleged homestead entry of said Henry Ohm, or in any other matter affecting the tract of land located by the heirs of Luis Maria Cabeza de Baca, known as Location No. 3, until such time as Your Honors shall appoint and direct an order herein; and that upon such hearing the writ herein prayed be made and confirmed until the final determination of this suit; and upon such final hearing made perma-
30 nent.

2. That Your Honors grant unto your orators your writ of injunction commanding the defendants, James R. Garfield and Frederick Dennett, and each of them, and their successors in office, and all persons claiming to act under the authority, direction or control of either of them, to place on file for future reference, as required by law, the Contzen survey and plat made under contract No. 136, dated June 17, 1905, running the lines of the tract of land located by the heirs of Luis Maria Cabeza de Baca, known as Location No. 3, so as to adjust such lines as near as may be to the lines of the public surveys.

3. That Your Honors decree that any matter shown upon said survey and plat or connected therewith, other than that included in the decision and order of the Commissioner of the General Land Office of April 9, 1864, hereinbefore mentioned, and other than the exterior boundaries, accessory lines, courses, distances, monuments and measurements showing the tract of land located by the heirs of Luis Maria Cabeza de Baca, known as Location No. 3, together with any topographical features and the references to the lines of the public surveys, be canceled and expunged from the said plat of said survey, and particularly the lines, courses, distances, monuments and measurements purporting to show the segregations from said lands of the alleged mineral portion, the Tubac Township, and the conflicting portions of the San Jose, Sonoita, Tumacacori and Calabasas claims.

4. To the end that the defendants may, if they can, show
31 why your orators should not have the relief hereby prayed, and may full, true and perfect answer make, according to the best of their knowledge, remembrance, information and belief, to the several matters hereinbefore averred and set forth, as fully and particularly as if the same were herein repeated paragraph for paragraph and they were thereto severally and specifically interrogated (but not under oath, an answer under oath being hereby expressly waived), may it please Your Honors to grant unto your orators a writ of subpœna ad respondendum, issuing out of and under the seal of this Honorable Court, directed to the said defendants, James R.

Garfield and Frederick Dennett, commanding them to be and appear and make answer unto this bill of complaint, and perform and abide by such order and decree herein as to this Court may seem to be required by the principles of equity and good conscience.

And that your orators may have such other or further relief in the premises as the nature of the circumstances of the case may require.

JAMES W. VROOM.
JOHN WATTS.
CORNELIUS C. WATTS.
DABNEY C. T. DAVIS, JR.

CHARLES A. KEIGWIN,
HARTWELL P. HEATH,
Solicitors for Plaintiffs.
HERBERT NOBLE,
DABNEY C. T. DAVIS, JR.,
CORNELIUS C. WATTS,
Of Counsel.

32 STATE OF NEW YORK,
County of New York, ss:

On this 9th day of December, 1908, before me personally appeared James W. Vroom, one of the above-named plaintiffs, who made solemn oath that he had read the foregoing bill of complaint subscribed by him and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

[SEAL.] LEO S. GLASEL,
Notary Public, New York County.

THE UNITED STATES OF AMERICA,
District of Columbia, ss:

On this 11th day of Dec. 1908, before me personally appeared Dabney C. T. Davis, Jr., one of the above-named plaintiffs, who made solemn oath that he had read the foregoing bill of complaint subscribed by him and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

J. R. YOUNG,
By F. E. CUNNINGHAM, *Ass't Cl'k.*

33 *Demurrer.*

Filed February 3, 1909.

* * * * * * *

To the Supreme Court of the District of Columbia, holding an equity court:

The Demurrer of James R. Garfield, Secretary of the Interior, and Frederick Dennett, Commissioner of the General Land Office, Defendants, to the Bill of Complaint of Cornelius C. Watts, Dabney C. T. Davis, Jr., John Watts, and James W. Vroom in the Above-entitled Action.

The defendants above named, not confessing or acknowledging all or any of the matters and things in the said complainants' bill to be true in such manner and form as the same are set forth and alleged, demur thereto, and for cause of demurrer show:

First. Because, as appears on the face of the bill, the real purpose of this suit is to recover certain real estate in the Territory of Arizona by trial of the legal title thereto; hence the cause of action is legal, not equitable, and this court, sitting as a court of equity, is without jurisdiction to hear and determine the controversy, and if complainants have any right to said real property or to the relief for which they pray, it must be asserted, if at all, in a court of law.

Second. Because, as appears on the face of the bill, complainants, if entitled to the relief prayed in their second and third
34 prayers, have a remedy at law, their allegation to the contrary notwithstanding; for if legal title to the real property in controversy passed to said complainants or their predecessors in interest on April 9, 1864, as alleged in paragraph 23 of said bill, naught else remains for the defendants to do other than to perform the ministerial duty of receiving and recording the plat of survey and field notes thereof, and the proper, full, and adequate remedy, in that event, is by petition for the writ of mandamus.

Third. Because it is patent on the face of the bill that if the legal title to the land in question did not pass to the complainants on, and by reason of the action of the Commissioner of the General Land Office, April 9, 1864, as alleged in said paragraph 23 of said bill, said legal title is still in the United States, which it is not shown has consented to this suit; and the court, in such event, is without jurisdiction.

Fourth. Because, on the face of the bill, it will be impossible for this court to grant the prayers of the complainants, without deciding whether, as matter of law, legal title to said land proceeded from the United States to said complainants, on April 1, 1864, as alleged, or is still vested in the United States. The determination of this question affects the interests of the United States rather than these nominal defendants. The United States is therefore a real and indispen-

sable party in interest, although not, eo nomine, a defendant, and has not consented, in this behalf to be sued.

Fifth. Because, on the face of the bill, it appears that the
35 acts complained of against these defendants and the acts sought to be enjoined are such as are exclusively within the jurisdiction of the Interior Department of the United States Government; are judicial and not ministerial in character, and are not subject to control, interference, or review by the judiciary department, in injunction proceedings.

Sixth. Because it appears from the allegations in the bill (particularly in paragraphs 25-30) that there are divers other persons who are necessary parties to the said bill, but who are not made parties thereto, and who are materially interested in the subject-matter of the action, and who would be injuriously affected if the relief prayed for was granted: viz., those who have initiated claims within Location No. 3.

Seventh. Because the court is without jurisdiction to grant that portion of complainants' third prayer whereby they seek to have expunged from the plat of survey the lines, etc., showing the segregation from said Location No. 3 of the San Jose de Sonoita claim, for the reason that the claimants thereto are necessary parties to this action, and are not made parties thereto, and would be injuriously affected if the relief prayed for was granted, their rights to said claim having been confirmed by the Supreme Court of the United States. (Ely's Administrator v. United States, 171 U. S., 220.)

Eighth. Because, it is apparent on the face of the bill, that the relief prayed for will adversely affect the interests of the citi-
36 zens of Tubac Township, who are necessary parties to this action but who are not so made thereto.

Ninth. Because on the face of the bill it appears that there has never been an adjudication by the Secretary of the Interior and the Commissioner of the General Land Office, or by either of such officers, to the effect that the lands involved were on June 17, 1863, non-mineral and vacant or unoccupied land such as the heirs of Luis Maria Cabeza de Baca were authorized to select under the terms of the sixth section of the act of June 21, 1860 (12 Stat., 21).

Tenth. Because on the face of the bill it appears that the complainants are not entitled to the relief prayed for, or to any relief against these defendants, or either of them.

Eleventh. Because said bill is in other respects uncertain, informal, and insufficient and does not state facts sufficient to entitle claimants to any relief.

Wherefore, and for divers other good causes of demurrer in said bill, these defendants demur thereto, and humbly demand the judgment of this court whether they, or either of them, shall be compelled to make any further answer to said bill of complaint, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

GEORGE W. WOODRUFF,
Assistant Attorney-General for the Department of the Interior, Solicitor and Counsel for Defendants.

37 DISTRICT OF COLUMBIA, *ss:*

James R. Garfield, Secretary of the Interior, and Fred Dennett, Commissioner of the General Land Office, defendants in the above-entitled cause, being first duly sworn, depose and say that they have read over the foregoing demurrer, and that the same is not interposed for delay.

JAMES RUDOLF GARFIELD,
Secretary of the Interior.
FRED DENNETT,
Commissioner of the General Land Office.

Subscribed and sworn to before me this Second day of February, 1909.

[SEAL.] EDW'D B. FOX,
Notary Public, D. C.

I, Daniel W. Baker, United States Attorney for the District of Columbia, say that I am counsel for the defendants herein, and have read over the foregoing demurrer and do certify that in my opinion the same is well founded in point of law.

DANIEL W. BAKER,
United States Attorney.

38 *Order Substituting Richard A. Ballinger for Defendant.*

Filed March 23, 1909.

* * * * * * *

It appearing to the Court that the defendant, James R. Garfield, has resigned from his office as Secretary of the Interior and that Richard A. Ballinger has been regularly appointed thereto and has qualified as such Secretary of the Interior, it is this 23rd day of March, 1909, ordered, on the application of complainant and with the assent of the United States Attorney, that the said Richard A. Ballinger as Secretary of the Interior be substituted as one of the defendants hereto and that this cause be maintained against him as the successor in office to one of the original defendants.

JOB BARNARD, *Justice.*

39 *Opinion of Court.*

Filed April 27, 1909.

* * * * * * *

Complainants file their bill herein against the Secretary of the Interior and the Commissioner of the General Land Office, to enjoin the said officers from proceeding further with the matter of the alleged homestead entry of Henry Ohm, or in any other matter affecting the tract of land selected by the heirs of Luis Maria Cabeza de Baca, known as Location No. 3, and to require said officers to place on file for future reference the Contzen survey and plat, made under

contract No. 136, dated June 17, 1905, running the lines of the said tract; and to cancel and expunge from said plat certain particular lines and measurements purporting to show segregations from said lands of alleged mineral portions, and conflicting portions of other claims.

The complainants aver that the republic of Mexico, by the treaty of Guadalupe Hidalgo of 1848, (9 Statutes-at-Large, 925,) and by the treaty of Mesilla, of 1854, (10 Statutes-at-Large, 1035,) ceded to the United States the territory which is now embraced within the boundaries of New Mexico and Arizona, including the Baca Location No. 3, located in Santa Cruz County, Arizona, said tract being one of a series of five locations granted to the heirs of said Baca by the United States, in exchange for the grant of Las Vegas Grandes, which had been granted by Mexico to said Baca.

By act of Congress of July 22, 1854, (10 Statutes-at-Large,
40 308,) the office of Surveyor General of New Mexico was established, and it was made the duty of said officer, to ascertain the origin, nature, character, and extent, of all claims to lands, under the laws of Spain and Mexico, under the instructions of the Secretary of the Interior; and the then Secretary issued instructions to said Surveyor General, who investigated the various claims and grants from said Governments, and reported to Congress the result; and by act of Congress, approved August 4, 1854, (10 Statutes-at-Large, 575,) the provisions of said act of July 22, 1854 were extended to the territory acquired by the said treaty of Mesilla, which was incorporated with the territory of New Mexico; and by act of July 15, 1870, (16 Statutes-at-Large, 304,) it was provided that the Surveyor General of the territory of Arizona, as to all lands in that territory, should have the same powers and duties as the Surveyor General of New Mexico, under the said act of July 22, 1854.

That the heirs of said Luis Maria Cabeza de Baca, by John S. Watts, their attorney, presented to the Surveyor General of New Mexico their claim for land included in the Mexican grant called "Las Vegas Grandes", and the town of Las Vegas also filed a claim for the same tract; and the Surveyor General reported to Congress, Dec. 18, 1858, that in the absence of either the other of said grants would be a good and valid grant; or, in other words, recognized both grants as binding, so far as the Government of Mexico was concerned.

The Senate Committee, by its report thereon, stated the two
41 claims, showing that the grant to said Baca and his seventeen sons, on May 29, 1821, was ratified and confirmed in February 1825, and was in fee, and is a genuine and valid title; and they also reported that the town of Las Begas (or Vegas) was claiming the same land under a grant made March 25, 1835, under which the claimants were put in possession, and under such claim the land was divided out, and several hundred families were then located upon it.

The committee also reported the recommendations of the Surveyor General to confirm both titles, and leave the claimants to adjust their conflicting rights in the courts; but thought it inadvisable that Congress should do this and disturb the settlers; and the counsel for the Baca heirs expressed a willingness to waive their older title in favor

of the settlers, if Congress would give them an equal number of acres in some other part of the territory, and the committee so recommended.

Whereupon the act of June 21, 1860, (12 Statutes-at-Large, 71,) was passed, whereby the two grants of the Las Vegas Grandes were both confirmed, with a power given to the Baca heirs to select, instead of the land so claimed by them, an equal quantity of vacant land, not mineral, in the territory of New Mexico, to be located by them in square bodies not exceeding five in number; and providing that the Surveyor General should make a survey and location of the land so selected by said heirs when required by them; and with the proviso that the right thereby granted should continue in force
42 for three years from the passage of said act, and no longer.

The Commissioner of the General Land Office then issued his instructions to the Surveyor General of New Mexico about July 26, 1860, calling his attention to the necessity of a survey of the Las Vegas tract, in order to ascertain how much land the Baca heirs would be entitled to in lieu thereof, and under such instructions the Surveyor General found the Las Vegas tract to consist of 496,446.96 acres; and that the said Baca heirs were entitled to select that amount of the unoccupied lands, not mineral, of New Mexico, in not more than five square bodies.

On June 17, 1863, the said heirs, by their attorney, made a selection of the said tract No. 3, and on the same day the Surveyor General certified to the said selection; and stated that the said tract contained one-fifth part of the private claim confirmed to said heirs, being 99,289.39 acres. He closed his certificate with these words:—"Said selection is hereby approved."

On June 18, 1863, said Surveyor General forwarded to the General Land Office in this city a copy of the said application and certificate, and in which he said, "as this location is far beyond any of the public surveys, I have not deemed it necessary to procure any certificate from the Register and Receiver of the Land Office, as from the nature of the case they cannot officially know anything concerning it."

In response to this, the Commissioner of the Land Office wrote said Surveyor General on July 18, 1863, that before the appli-
43 cation for said location could be approved by his office, a statement from the Surveyor General, and from the Register and Receiver, that the land thus selected was vacant and not mineral, should be furnished.

Thereafter, on April 2, 1864, the Surveyor General sent a further certificate, showing that there was no evidence in his office that the tract was mineral, or that it was occupied. That there had been no public surveys in the neighborhood of said tract, and no record concerning the land in his office, nor in the office of the Register or Receiver of the Land Office of New Mexico; and that he had no personal knowledge whether the land was vacant and not mineral, or otherwise.

On March 25, 1864, the Receiver of the Land Office in New Mexico certified that this land was vacant and not mineral, so far as the

records of his office showed, not having been surveyed; and the Register of the Land Office on the same day certified that said lands were not surveyed, and from all information in his office the said lands were vacant and not mineral.

That the Commissioner of the General Land Office, on April 9, 1864, directed a survey of said lands, stating therein that this tract had been approved by the Surveyor General of New Mexico, under whose jurisdiction the application properly came at the date of its approval. The directions were then given in detail how to make the survey, and how to return the field notes, and how to mark the boundaries.

After quoting the certificate of the Surveyor General of
44 New Mexico, of June 17, 1863, the Commissioner closed his direction for the survey with the following words:—

"GENERAL LAND OFFICE, *April* 9, 1864.

Levi Bashford, Surveyor General, Tucson, Arizona:

The foregoing statement, and the certificate of Surveyor General Clark, having been submitted to this Department, and having undergone a careful examination, the location being approved by him, to perfect title under the authority of the act approved June 21, 1860, application for survey having been made, instructions (copy herewith attached) have been given to Surveyor General Levi Bashford of Arizona, in which territory the lands located now are, to run the lines indicated, and forward a complete survey and plat, to be placed on file for future reference as required by law.

J. M. EDMUNDS, *Com'r.*"

The bill then avers that an attempt was made to survey the said tract, under the instructions and authority given on April 9, 1864, by the said Commissioner; but, upon information and belief, the complainants state that the surveyors were killed by hostile Indians while engaged in making the said survey.

45 That thereafter, though frequently requested, the Commissioner failed and refused to have the survey made, until on or about Jan. 12, 1905, when he authorized a survey to be made by one Philip Contzen, under contract No. 136; and that under said contract said Contzen and others made the survey, and the Surveyor General of Arizona approved the same Nov. 23, 1906; and said plat and survey have been examined and found correct by the Commissioner of the General Land Office.

That on or about Jan. 12, 1905, the Commissioner of the Land Office instructed the Surveyor General that it was his duty in the first instance to determine, as the survey progressed, what portions of the lands, if any, were known to be mineral, or were occupied or claimed on June 17, 1863, and such portions were to be excepted from the said survey of the Baca claim; and in December 1906, in pursuance of such instructions, the Surveyor General forwarded the survey and plat of said tract to said Commissioner with his report, and recommended that the location of said Baca Float No. 3, made as hereinbefore stated on June 17, 1863, be entirely rejected.

That on May 13, 1907, the Commissioner, without jurisdiction so to do, ordered a hearing before the Surveyor General, to determine whether the said lands were, at the time of said location, vacant and non-mineral.

From that order an appeal was taken to the Secretary of the Interior, who, on June 2, 1908, by his First Assistant, affirmed
46 the decision of the Commissioner, in so far as the same remanded the case for a hearing before the said Surveyor General.

On Oct. 10, 1908, a motion to review the said decision of the Secretary was made, and the same held under advisement until Dec. 5, 1908, when the motion was denied, and the matter thereby finally disposed of.

The complainants aver that by the acts of the former Commissioner, J. M. Edmunds, in ordering a survey of the tract of land known as said Location No. 3, title thereto vested in fee in the heirs of said Luis Maria Cabeza de Baca, and their successors in title, as stated, so that it was not within the power of the Secretary of the Interior, or his successors in office, to revoke or annul the approval and adjudication made in that behalf by said Edmunds, or to injuriously affect the rights of said heirs or their successors in title.

That said tract of land, as they are informed, has always been treated by the Land Department as thereby segregated from the public domain, and not open to entry or settlement, and has been marked upon the maps issued under the authority of the General Land Office, as "Private Land Grant," as shown by the map of Arizona of 1903.

That — Feb. 2, 1899, one Henry Ohm made application for a homestead entry upon the north half, and the southeast quarter of the southeast quarter, and the northeast quarter of the southwest quarter, of Section 9 in Township 22 south of Range 13 east, containing 160 acres, lying within the lines of said tract, and
47 claimed to be subject to entry at the Land Office at Phœnix, Arizona.

That the Register and Receiver at said Land Office forwarded said homestead application to the Commissioner for instructions, stating that said tract on which said Ohm sought to make a homestead entry was included in said Location No. 3, reserved by letter G of July 28, 1899. That on June 15, 1908, one S. V. Proudfit, Acting Commissioner, instructed the said Register and Receiver to allow said Ohm to proceed with making proof, and to issue final certificates on the said entry, if such proof was found satisfactory, stating, however, that final action thereon would not be taken by the Commissioner until the Baca Float decision had become final.

That notwithstanding said officers well knew the pendency of the proceedings in the Interior Department, to establish the rights of the complainants in the premises, that they proceeded with the matter of said Ohm's application, without giving complainants any notice of their proposed action, or of such action when taken, nor any opportunity to be heard in regard thereto; and that complainants only heard about the matter on Nov. 28, 1908, through inquiries

made by them, after receiving a communication from a correspondent in Arizona.

They aver that there are other entries on said tract similar to that of said Ohm, and in a like situation as to their present status; that the execution of the instructions of June 15, 1908, with reference to the homestead entry of said Ohm and the other entries re-
48 ferred to, will throw a cloud upon their title to said land, and is likely to cause many persons to attempt to settle upon said lands, and to enter the same in the Land Department; and that they will be unable to remove such persons, or to quiet their title against them without a multiplicity of suits; and that they are therefore entitled in this court to an order enjoining and restraining the defendants, as such Secretary and Commissioner, and the subordinate officers of the Land Department, from in any way carrying out said last mentioned instructions, and from permitting any entries upon said land, or holding the same open to entry.

That the defendants intended and proposed, and do now intend and propose, to convey a pretended title in fee simple to a large portion of said tract to said Ohm and the other persons who have or may settle thereon, to the end that said lands so settled and entered may become the property of such persons, and be permanently vested in them.

That on or about May 1, 1864, the heirs of said Luis Maria Cabeza de Baca conveyed the said tract of land, by a good and sufficient deed, to John S. Watts; and that by mesne conveyances the complainants have succeeded to the title of said Watts in said lands. That the complainants intend to proceed with due diligence to enforce in law and in equity their rights as owners of all the lands contained in the description of said tract; and they aver that said tract is of great value, being worth more than $100,000. That they have no adequate remedy at law, and are remediless in the prem-
49 ises, except in equity; and that no other or previous application has been made for the relief asked for by them.

Said bill is verified by two of the four complainants, and was filed herein December 11, 1908.

On Feb. 3, 1909, the then Secretary of the Interior, and the Commissioner of the General Land Office, filed a demurrer thereto, stating as grounds thereof that it appears on the face of the bill that the real purpose of this suit is to recover certain real estate in the territory of Arizona by trial of legal title thereto; and that therefore this court is without jurisdiction; and if complainants are entitled to any relief it must be asserted in a court of law; and that if the complainants took title to said ground as claimed, they would have an adequate remedy as to the matters complained of by petition for writ of mandamus; and if the title did not pass to the complainants as claimed, that the same is still in the United States, and the court is without jurisdiction to entertain a suit against the United States without its consent; and that the United States is a necessary and indispensable party, and has not consented to be sued herein; and that the matters complained of are within the jurisdiction of the Interior Department, are judicial, and not ministerial in character, and are

not subject to control or review in injunction proceedings; and that there are divers other persons who are necessary parties to the said bill, but who are not made parties thereto, and who would be injuriously affected if the relief prayed for was granted, namely,
50 those who have initiated claims within said Location No. 3.

That the court is without jurisdiction to grant that portion of the third prayer seeking to have expunged from the plat or survey, the lands affecting other parties, because those other parties are not made defendants herein; and because the claim of the San Jose de Sonoita has been confirmed by the Supreme Court of the United States, in the case of Ely's Administrator v. United States, 171 U. S., 220; and because the relief prayed for will adversely affect the interests of the citizens of Tubac Township, who are necessary parties thereto; and because it appears from the bill that there has never been an adjudication by the Secretary of the Interior, and the Commissioner of the Land Office, or either of them, to the effect that the lands involved were, on June 17, 1863, non-mineral and vacant or unoccupied land; and because it appears by the bill that the complainants are not entitled to the relief prayed for, or to any relief against these defendants; and because in other respects said bill is insufficient.

The case has been argued on this demurrer, and submitted to the court for a decision, Secretary Ballinger being substituted as defendant instead of Secretary Garfield.

The grounds for the demurrer are stated in eleven different paragraphs, but the demurrer goes to the whole bill.

Under the well-known rule of pleading, if a demurrer is filed to a bill in equity as a whole, and any portion of the bill is well
51 pleaded, entitling the complainant to any substantial relief as prayed, the general demurrer must be overruled. To illustrate this in the present case; suppose the court should hold that the title to the tract of ground described had passed under the act of Congress, and the proceedings thereafter, up to and including the order of the Commissioner of the General Land Office of April 9, 1864, for a survey of the tract. Then the court might well restrain the Secretary of the Interior, and the Commissioner of the General Land Office, from allowing homestead entries, or settlements or claims upon the said tract, as if the same were a part of the undisposed of lands belonging to the United States. Under that holding of the court, it would be competent to grant so much of the relief as is asked for by the first prayer of the bill.

Having jurisdiction for that purpose, in order to settle the controversy between the complainants and the said officers, the court might also require the Contzen survey to be filed and recorded, notwithstanding the law might give a remedy by mandamus for that, and there might be some controversy over the right to have portions of the said plat and survey canceled and expunged. As to that relief, the demurrer would in such case have to be overruled.

It seems to me that the main question to be decided on this demurrer is the one as to the effect of the acts of Congress referred to,

and proceedings thereunder, which counsel claim vest the title in the heirs of the said Baca.

The general legislation with reference to this grant seems
52 to have been approved by the Supreme Court of the United States in reference to another portion of the land taken by the Baca heirs, known as No. 4, in the case of Shaw v. Kellogg, 170 U. S., 312. In that case the selection was made, as in this; the Land Department approved the survey, field notes, and plat, but no patent was issued, none having been provided for by the act.

In closing his opinion in that case Mr. Justice Brewer says:

"Congress in 1860 made a grant of a certain number of acres, authorized the grantees to select the land within three years anywhere in the territory of New Mexico, and directed the Surveyor General of that territory to make survey and location of the land selected, thus casting upon that officer the primary duty of deciding whether the land selected was such as the grantees might select. They selected this tract. Obeying the statute and the instructions issued by the Land Department, that officer approved the selection, and made the survey and location. The Land Department, at first suspending action, finally directed him to close up the matter, to approve the field notes, survey and plat; and notified the parties through him that such field notes, survey and plat, together with the act of Congress, should constitute the evidence of title. All was done as directed. Congress made no provision for a patent, and the Land Department refused to issue one. All having been done that was prescribed by the statute, the title passed."

53 In that case the grantees entered into actual possession, and fenced the entire tract, and paid taxes upon it for a number of years; and the contention was that after the location it turned out that some of the lands were mineral. By the direction of the Land Department, the Surveyor General, in that case, added to his certificate of approval the words, "subject to the conditions and provisions of Section 6 of the act of Congress approved June 21, 1860," the Department seeking thereby to do its full duty, and to reserve the mineral land, if any there was, embraced within the limits of the said location.

It is contended that the question as to the land being vacant and non-mineral, ought to have been determined when the location was approved by the Surveyor General, and when the survey was ordered by the Commissioner of the General Land Office.

It was said in the certificates in the present case, that no surveys had actually been made of the territory in which this tract known as Float No. 3 was located; but the heirs of Baca then claimed it to be vacant and non-mineral; and they were not obliged to select their ground, taken in lieu of the Las Vegas grant, where surveys had been made; and in the absence of any proof to the contrary, they might well have selected lands in which mineral might afterwards have been found; and if they had done so, as was held in the said case of Shaw v. Kellogg, it would not have deprived them of title, if years afterward, mineral had been discovered on a portion of the tract.

54 As stated in said case, "The amount of the Las Vegas claim was large, and as the claimants were required to make their locations in square bodies not exceeding five in number, each location would necessarily be of a tract of considerable size. In fact, each one was nearly 100,000 acres. The tract thus located was as a whole to be non-mineral. No provision was made for indemnity lands, in case mineral should be found in any section or quarter section, so that when the location was perfected the title passed to all the lands, or to none.

It will also be perceived that Congress did not permit this location to be made anywhere in the public domain, but only within the limits of the Territory of New Mexico. It was not like a military land warrant, subject to location upon any public lands, but only a grant which could be made operative within certain prescribed and comparatively narrow limits—limits not even so broad as those of the territory ceded by Mexico. There were then but few persons living in New Mexico; it contained large areas of arid lands; its surface was broken by a few mountain chains, and crossed by a few streams. It was within the limits of this territory, whose conditions and natural resources were but slightly known, that Congress authorized this location. The grant was made in lieu of certain specific lands claimed by the Baca heirs in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere within the limits of New Mexico. The grantees, the
55 Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico. We say 'lands then known to contain mineral,' for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and it would be an insult to the good faith of Congress to suppose that it did not intend that the title when it passed should pass absolutely, and not contingently upon subsequent discoveries. This is in accord with the general rule as to the transfer of title to the public lands of the United States. In cases of homestead, preemption or townsite entries, the law excludes mineral lands, but it was never doubted that the title once passed was free from all conditions of subsequent discoveries of mineral." The authorities cited in said case show that where non-mineral lands are to be selected, the courts have held that the word "known," as applied to mineral, must apply to the time of the sale or grant.

How was their mineral or non-mineral character to be determined? The court stated, in said case, with reference to the lands taken under this grant, that the Surveyor General of New Mexico
56 was directed to make survey and location of the lands selected, and that upon him was cast the specific duty of saying that the lands selected were such as the Baca heirs were entitled to select;

and that it was for him to say, in the first instance, at least, whether the lands so selected were lands vacant and non-mineral.

In that case the certificates of the Surveyor General, and of the Register and Receiver of the Land Office, stated that they were perfectly satisfied that the land was not mineral and was vacant; their certificates were not based, however, upon personal knowledge, but from good and sufficient evidence.

In the present case the Surveyor General approved the selection, and in his certificate sending the selection with his approval to the Land Department, he omitted the certificates of the Register and Receiver because from the nature of the case they could not officially know anything concerning it.

This certificate was not satisfactory to the Commissioner, and he asked for a certificate from the Register and Receiver, and certificates were sent, showing that so far as the said officers knew, there was no evidence in either of the offices to show that the tract was mineral, or that it was occupied; and the Register added, from all information in his office, the same was vacant and not mineral.

On receipt of these three certificates, the Commissioner seems to have approved of the location, for on April 9, 1864, he gave directions for the tract to be surveyed, which was the only thing
57 necessary to segregate it from public land, the selection having been approved by the Surveyor General, and the purpose of the survey being to perfect title under the authority of the act approved June 21, 1860.

Being of the opinion that the title to this tract vested in the heirs of said Baca when the location was approved, and the survey ordered, I think the complainants may maintain their bill for some portion, at least, of the substantial relief for which they pray; and the demurrer, being to the whole bill, must be overruled.

This conclusion as to title, if correct, will enable the suit to be maintained, notwithstanding the objection made as to want of other parties defendant. Title being out of the United States, it has no interest and is not a necessary party; and the Land Department can not rightfully treat the tract as open to public entry, and the officers may therefore be enjoined.

JOB BARNARD, *Justice.*

Order Overruling Demurrer.

Filed May 24, 1909.

In the Supreme Court of the District of Columbia.

In Equity. No. 28207.

CORNELIUS C. WATTS et al., Complainants,
vs.
RICHARD A. BALLINGER, Secretary of the Interior, and FRED DENNETT, Commissioner of the Land Office, Defendants.

58 This cause came on for hearing at this term of Court upon demurrer to the bill of complaint, and was argued by counsel, and thereupon in consideration thereof, it is this 24th day of May, A. D. 1909,

Adjudged, ordered and decreed: That the said demurrer be and the same hereby is overruled.

It is further ordered: That the defendants shall have sixty days from the date hereof within which time to file their answer or plea to the said bill.

By the Court.

JOB BARNARD, *Justice.*

We hereby consent to the entry of the above order.
Dated May 22, 1909.

HARTWELL P. HEATH,
CHARLES A. KEIGWIN,
Solicitors for Plaintiff.

Filed July 22, 1909.

In the Supreme Court of the District of Columbia.

CORNELIUS C. WATTS, DABNEY C. T. Davis, jr., John Watts, and James W. Vroom, plaintiffs,
v.
RICHARD A. BALLINGER, SECRETARY of the Interior, and Frederick Dennett, Commissioner of the General Land Office, defendants.
} In Equity. No. 28207.

To the Supreme Court of the District of Columbia, holding an equity court.

The joint and several answer of Richard A. Ballinger, Secretary of the Interior, and Frederick Dennett, Commissioner of the General Land Office, defendants to the bill of complaint of Cornelius C. Watts, Dabney C. T. Davis, jr., John Watts, and James W. Vroom, plaintiffs:

These defendants now, and at all times hereafter, saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, and especially saving and reserving all benefit and advantage from these matters and rights set forth in the demurrer of said defendants to said bill of complaint and from other

good causes of demurrer in said bill contained, which said demurrer was overruled by this honorable court on the 24th day of May, 1909, with leave to answer over, for answer thereunto, or to so much or such parts of said bill as these defendants are advised is material for them to make answer unto, they answer and say:

They have no knowledge, save by said plaintiffs' said bill, that said Cornelius Watts and Dabney C. T. Davis, jr., are citizens of the State of Virginia; or that John Watts is a citizen of Colorado; or that James W. Vroom is a citizen of the State of New York; but they do admit that said Richard A. Ballinger is a citizen of the State of Washington, and that said Frederick Dennett is a citizen of North Dakota, and that they, the said Richard A. Ballinger and Frederick Dennett, are now residing in the District of Columbia.

1. And further answering, these defendants admit that at the time of filing said bill James R. Garfield was Secretary of the Interior, and that Richard A. Ballinger, on the 6th day of March, 1909, succeeded said Garfield as said Secretary, and that he is now Secretary of the Interior, and as such has charge of the administration of the laws of the United States relating to the public lands; and that at the time of filing said bill, and since, the defendant, Frederick Dennett, was and is Commissioner of the General Land Office, and as such has charge, under said Secretary, of the administration of said laws.

2. They admit the allegations of the second paragraph of said bill, save and except the statement that Baca location No. 3 "is one of a series of five locations granted by the United States to the heirs of Luis Maria Baca," if, as in form pleaded, it is meant that said location is one of "five *locations* (i. e., designated tracts of land) granted." They aver that the so-called Baca location No. 3 refers to an attempted selection by the heirs of Luis Maria Baca pursuant to authority granted by Congress, the matter of which selection is still in process of administration and undetermined in the Department of the Interior, as hereinafter more fully set forth.

3–12. They admit the allegations in the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth paragraphs of said bill.

13. They admit that on or after June 17, 1863, the heirs of Luis Maria Baca, by John S. Watts as their attorney, presented to the surveyor-general of New Mexico, the application mentioned in paragraph 13 of said bill, but deny that said application as so presented was duly made, and aver that at the time said application was so tendered the land sought to be selected was in the then newly created Territory of Arizona, for which last-mentioned Territory a surveyor-general had been duly appointed and qualified, and to whom notice of such selection and application for survey should properly have been made; all facts relating to which are hereinafter more fully set forth.

14. They admit that on June 17, 1863, the surveyor-general of New Mexico made the so-called certificate mentioned in paragraph 14 of said bill and on June 18, 1863, forwarded the same to the Commissioner of the General Land Office, with the letter set forth in said paragraph 14; but they deny that at said times said surveyor-general of New Mexico had authority or jurisdiction to take any action with respect to said selection.

15. They admit that on July 18, 1863, the Commissioner of the General Land Office wrote the said surveyor-general of New Mexico the letter set forth in paragraph 15 of the said bill, and also that the said surveyor-general transmitted to said commissioner the letter bearing date April 2, 1864, also set forth in said paragraph 15. They further admit that the register and receiver of the United States land office at Santa Fe, N. Mex., made the certificates set forth in said paragraph 15, but aver that said certificates were not received by said commissioner until long after April 9, 1864.

16. They admit that the letter of instructions, dated on said April 9, 1864, set forth in paragraph 16 of said bill, was written by the Commissioner of the General Land Office to the surveyor-general of Arizona, but aver that the same was not induced by or based upon any finding or information as to the character or condition of the land therein referred to, and especially that the same was not induced by, based upon, or with knowledge of the certificates of

the register and receiver set forth in paragraph 15 of said bill.

17. They deny that any such attempt to survey the tract, as alleged in paragraph 17 of said bill, was ever made or that the surveyors were killed by hostile Indians while engaged in the work of said survey.

18. They deny that "though thereunto frequently required and requested by the heirs and representatives of Luis Maria Baca, the Commissioner of the General Land Office failed and refused to continue, or have made, the said survey," as alleged in the eighteenth paragraph of said bill, and show that, through leave given by the Commissioner of the General Land Office by mistake and misapprehension of his power in the premises, the heirs of Baca, in the year 1866, undertook to substitute in place of the tract of land now in question another tract of land as Baca Location No. 3, and, recognizing their duty to make a deposit of money, as required and mentioned in the commissioner's letter of April 9, 1864, hereinbefore referred to, the heirs of said Baca, by their attorney, John S. Watts, offered to make such deposit for the estimated cost of survey of said so-called amended or substituted location, but in fact never did make the said deposit, and survey of said amended or substituted location was never made. And these defendants aver that the heirs or assigns of said Baca never did make the deposit of money required in the said commissioner's letter of April 9, 1864, for the survey of the tract now in question, and

did not claim any right or title to the said tract from 1866 until after 1899, as will hereinafter more fully appear. These defendants admit, however, that a survey of the tract now in question was made in 1905 and that the plat and survey were examined and approved as strictly conformable to the field notes of survey, but the circumstances leading to and connected with such survey will be more fully set out hereinafter.

19. They admit that on January 12, 1905, the Commissioner of the General Land Office instructed the surveyor-general of Arizona that the duty of investigating and the determining, in the first instance at least, the character of the lands involved rested upon said surveyor-general and that such investigation should be conducted and determination made as the work of survey progressed in the field, but they deny that said instructions were in disregard of the "decision and order * * * of April 9, 1864," as will hereinafter, in further answer, appear. They admit that, as alleged in paragraph 19 of said bill, said surveyor-general was further instructed that upon him devolved the duty of determining what portion of the lands in controversy was occupied or claimed under private grants at the date of selection, and that such lands as he (the said surveyor-general) found to have been known as mineral or occupied or claimed on June 17, 1863, were to be excepted from the survey. They also admit that the surveyor-general, pursuant to such instructions, forwarded survey and plat as alleged, with a report of the information he

had gathered showing the known mineral character of a part of the lands involved herein and the existence of adverse claims thereto and occupation thereof, and a recommendation that the entire location be rejected, for reasons fully set forth in said report, a copy of which is hereto attached, marked "Exhibit B" and made a part of this answer.

20–21. They admit the allegations of fact in the twentieth and twenty-first paragraphs of said bill, except they deny in so doing that the order of April 9, 1864, was in any wise disregarded, and suggest to the court that they are advised that the statement in said paragraphs "contrary to law and without jurisdiction so to do" is a conclusion of law requiring no answer.

22. They admit that on October 10, 1908, a motion to review the decision of the Secretary of the Interior was made, and that on December 5, 1908, the same was denied, which action was a final disposition of the said motion, leaving in force the decision and order of the Commissioner of the General Land Office remanding the matter for a hearing before the surveyor-general of Arizona as set forth in paragraph 20 of the said bill.

23. They suggest that the allegation in twenty-third paragraph of said bill is, as they are advised, purely a conclusion of law, which they need not answer, although to their silence in this behalf no admission affecting the soundness or effect of plaintiffs' conclusion as to the law, is to be imputed. And defendants further suggest that they are advised

that said conclusion of law, and the determination whether it be sound or otherwise, involves the trial of title to real estate not situate within the jurisdiction of this court, and as such not triable before this court of equity.

24. They deny, as alleged in the twenty-fourth paragraph of said bill, that the land embraced in said so-called Location No. 3 has always been treated by the land department as segregated from the public domain, or that it has for many years been marked upon maps issued under the authority of the General Land Office as a private land grant, save and except that they admit that it has thus been marked on maps issued since 1903, exactly as private land grant claims are so marked—merely to show geographical location without any regard to the adjudication of title. They admit that from time to time the land has been held as not open to entry or settlement, the circumstances of which will be shown later in this answer.

25–28. They admit the allegations of the twenty-fifth, twenty-sixth, twenty-seventh, and twenty-eighth paragraphs of said bill, but aver that the said homestead entry of Henry Ohm is situated within the limits of the so-called Tumacacori private land grant claim, which, as hereinafter will appear, on June 17, 1863, and for a long time thereafter, was reserved from all manner of disposition and was not on said last-mentioned date or for a long time thereafter subject to selection by the heirs of Baca; and that for said reason, plaintiffs were not

entitled to any notice in relation to the said homestead entry.

29. As to the facts alleged in the twenty-ninth paragraph of said bill, the defendants have no knowledge.

30. They admit the allegation in the thirtieth paragraph, but aver that most, if not all, of said entries are within the Tumacacori, Calabazas, or San Jose de Sonoita grants in conflict with said Baca float, as will hereinafter appear.

31. They deny the allegations of the thirty-first paragraph and say that the execution of the instructions with reference to the entries of said Ohm and others will not throw a cloud on the title of the plaintiffs for the reason that the legal title is not in them vested, but is in the United States, and that if the Department of the Interior, acting for the United States, ultimately passes title to said plaintiffs the said homestead entries will not have been perfected and will not cast a cloud on the title so conveyed; and, further, they aver that the instructions with reference to said homestead entry of Henry Ohm provide that no final action on said entry will be taken until the "Baca float decision has become final," i. e., until the plaintiffs' claim shall have been finally rejected or allowed by the Department of the Interior.

32. They deny the allegations of the thirty-second paragraph and aver that they have no intention to convey title to the lands involved unless it be finally determined that plaintiffs are not entitled to a conveyance of the title to said land.

33. Answering the averments of the thirty-third paragraph of said bill, they state they have no knowledge and have not been informed, save by plaintiffs' bill, and they can not set forth, as to their belief or otherwise, whether said plaintiffs have succeeded to the title of the heirs of Luis Maria Cabeza de Baca, through conveyances from John S. Watts or otherwise; and of this, and of their ownership of the right granted the heirs of said Baca, and of their consequential right to maintain this action, they demand that said plaintiffs shall furnish proof.

34. Defendants have no knowledge, other than as alleged in the thirty-fourth paragraph of said petition, as to plaintiffs' intention in enforcing their alleged rights in the land involved, but aver that plaintiffs have never been in possession of said land and that from 1866 to 1899, as will hereinafter appear, the claimants of said location were claiming title to other land than that included in the so-called selection of June 17, 1863, as the location of their float No. 3, and were repeatedly soliciting the Department of the Interior, as well as Congress, for permission to make still another location on the ground that the land embraced by the third selection or float was mineral in character and not such as the heirs of Baca were authorized to select.

35. Defendants admit the allegation in the thirty-fifth paragraph contained.

36. Defendants deny that plaintiffs have no adequate remedy at law and that they are remediless except in equity, and aver that their proper remedy, if any they need or if any they have a right to seek, is

at law and not at equity, all of which these defendants pointed out in their demurrer to this bill.

37. Defendants admit the allegations in the thirty-seventh paragraph of said bill.

Furthermore, and for a more complete answer, defendants say that the United States has never conceded and does not now concede that title to the land involved has ever passed out of the United States to the heirs or assigns of Baca; that the United States has never admitted and does not now admit, but, on the contrary, denies that the said letter of April 9, 1864, written by the Commissioner of the General Land Office, passed title to the lands involved in this suit, or to any lands whatsoever; that the United States has at all times since June 17, 1863, been in possession of said land, and that the Baca claimants, including these plaintiffs, have never been in such possession and have never in any manner attempted to take possession thereof or to exercise or discharge the rights or duties of ownership thereover, either by the assessment or payment of taxes thereon or otherwise; but, on the contrary, as will hereinafter appear, said Baca claimants until 1899 were attempting to secure a survey and passing of title to another and different tract of land as the situs of said float No. 3.

Furthermore, defendants say that on or about the 30th day of October, 1862, said John S. Watts, as agent for said Baca heirs, attempted and sought to select and locate, under and pursuant to said Baca float No. 3, lands other and different from those involved in this suit; that under date of November 8,

1862, the surveyor-general of New Mexico reported said attempted selection to the Commissioner of the General Land Office, the following being a copy of his said report:

SURVEYOR-GENERAL'S OFFICE,
SANTA FE, N. MEX.,
November 8, 1862.

SIR: I have the honor to inclose herewith a copy of the application of the heirs of Luis Maria Cabeza de Baca to locate, at "Bosque Redondo," on the Pecos River, in New Mexico, one-fifth of the private claim confirmed to them by the act of Congress approved June 21, 1860, to which is added my certificate and the certificate of the register and receiver of the land office, certifying, in accordance with your instructions of July 26, 1860, that the lands described in the application are vacant and not mineral.

I also inclose a copy of an order issued by Brigadier-General Carlton, on the day of the filing of the application by the heirs of Baca, establishing a military post at the "Bosque Redondo."

The "Bosque Redondo" is described as a fertile valley, well timbered with cottonwood and willow, about 20 miles in length and from 2 to 5 miles in width, on the river Pecos. I am not advised whether the military post established by the inclosed order will fall within the limits of location No. 3 designated in the inclosed application, but shall probably be informed within a short time and will report the facts.

As this location is far beyond the limits of the public surveys, I have not filed a copy of the application with the register of the land office, supposing it unnecessary.

I am, very respectfully, your obedient servant,

JOHN A. CLARK,
Surveyor-General.

Hon. J. M. EDMUNDS,
Commissioner General Land Office,
Washington City, D. C.

The said letter and the inclosed application and certificates were received at the General Land Office, Washington, December 26, 1862, as is shown by a stamp on said letter; the said application and certificate being as follows:

SURVEYOR-GENERAL'S OFFICE,
SANTA FE, N. MEX.,
October 31, 1862.

I, John A. Clark, surveyor-general of New Mexico, do hereby certify that on this day John S. Watts, esq., in behalf of the heirs of Luis Maria Cabeza de Baca, filed in this office an application in the words and figures following, viz:

"SANTA FE, N. MEX.,
"*October 30, 1862.*

"Hon. JOHN A. CLARK,
"*Surveyor-General, Santa Fe, N. Mex.:*

"I, John S. Watts, the attorney of the heirs of Don Luis Maria Cabeza de Baca, have this day selected as one of the five locations belonging to said heirs, under the sixth section of the act of Congress approved June 21, 1860, a

place called and known as the Bosque Redondo on the River Pecos, the center of said location to be a point on the northeast bank of the River Pecos, 5 miles below the mouth of the canyon forming the valley of said River Pecos, the location being so surveyed as to form a square on that center, with the lines running east and west, north and south, the distance required to form the area of said location. I further state that said land is entirely vacant, unclaimed by anyone, and not mineral to my knowledge.

"I further state that if at any time the United States wishes to establish a military site in that part of New Mexico and the most suitable location should be found to exist within the above lines, then the said heirs are bound to deed in fee to the United States 1 mile broad, running east and west across said land, including the location of said post, in consideration of the protection extended to that exposed and unsettled portion of New Mexico.

"JOHN S. WATTS,
"*Attorney for the Heirs of*
"*Don Luis Maria Cabeza de Baca.*"

And I further certify that from the best information in my possession I believe the land described in said application is vacant and is not mineral; and I further certify that the said tract of land being the one-fifth part of the private claim confirmed to said heirs contains 99,289.39 acres, and that this location is the third of the series, and with the two locations heretofore made, numbered 1 and 2, includes three-fifths of the said private claim confirmed

to the heirs of Luis Maria Cabeza de Baca, by the act of Congress approved June 21, 1860.

In witness whereof I have hereto set my name this 31st October, A. D. 1862.

JOHN A. CLARK,
Surveyor-General of New Mexico.

UNITED STATES LAND OFFICE,
SANTA FE, N. MEX.,
November 8, 1862.

We, the undersigned register and receiver of the United States land office at Santa Fe, N. Mex., do hereby certify that there is nothing of record in this office to show that the tract of land described in the foregoing application is occupied or that any portion of it is mineral.

J. HOUGHTON,
Register, etc.
JOHN GREINER,
United States Receiver, etc.

They aver that thereafter and on January 18, 1863, said John S. Watts, as such agent and attorney, asked leave to withdraw said selection in manner following:

UNITED STATES OF AMERICA,
THIRTY-SEVENTH CONGRESS,
HOUSE OF REPRESENTATIVES,
Washington City, January 18, 1863.

Hon. J. M. EDMUNDS,
Commissioner General Land Office.

SIR: Just before leaving Santa Fe, N. Mex., I, as the attorney for the heirs of Luis Maria Baca and with their consent, made a location for them on the Rio Pecos at a place called the Bosque Redondo with the expectation and

belief that military protection would be offered to that part of New Mexico by the location of a post in that vicinity. No suitable place was found for a post, and unless one is established in that vicinity it will be impossible to have the location either surveyed or settled. I have just received notice that the heirs desire the location changed to some point where it is safe to settle and have the land surveyed. As no survey or confirmation of the location has yet been made, I desire the permission of your office to withdraw the location asked for at the Bosque Redondo in order that the heirs may select some locality that can be settled and surveyed before the law expires in July next, under which the right to locate exists.

Yours, respectfully,

JOHN S. WATTS,
Attorney of Heirs of Luis Ma. Baca.

Whereupon, and responsive thereto, the withdrawal of the application was permitted, as follows:

GENERAL LAND OFFICE,
February 5, 1863.

JOHN A. CLARK, Esq.,
Surveyor-General,
Santa Fe, N. Mex.

SIR: The Hon. John S. Watts, as acting attorney for the heirs of Don Luis Maria Cabeza de Baca, has filed in this office an application dated the 18th of January last, for the withdrawal of his application dated the 30th day of October, 1862, and filed in your office, for the location of one of the five

tracts granted to said heirs by the act of June 21, 1860.

As the application has not been ripened into a specific location, no locality having been designated according to any recognized lines of the public surveys, nor reported by the surveyor-general as definitely acted upon, this office accedes to the request of Mr. Watts to withdraw the application, the more readily as Indian hostilities and other causes in the country would delay the establishing within any reasonable period of the land located, and unavoidably hold the matter in the meantime in suspense.

You are requested to acknowledge the receipt of this communication.

Very respectfully, your obedient servant,

J. M. EDMUNDS,
Commissioner.

The defendants, further answering that the court may be in possession of all the facts material to a decision of the issue presented by plaintiffs' bill and this answer, aver that by act of Congress dated February 24, 1863 (12 Stat., 664), the Territory of Arizona (within which the land in controversy lies) was created and provision therein made for the appointment of a surveyor-general, who, with the other territorial officers, for which the act provided, was to have the powers and was to discharge the duties as upon the same officers in the Territory of New Mexico were conferred by the act creating the last-mentioned Territory. Under this act the de-

fendants aver (the facts being of public record in the General Land Office) that the office of surveyor-general for Arizona was established May 6, 1863; that Levi Bashford, mentioned in paragraph 16 of plaintiffs' bill, was appointed such surveyor-general on May 27, 1863, and duly confirmed; that he took the oath of office and executed the bond of him required, June 2, 1863, the said bond being forwarded to the Comptroller of the Treasury June 11, 1863; that on June 3, 1863, Surveyor-General John A. Clark was notified of the establishment of the office of surveyor-general for Arizona and of the appointment of Levi Bashford as surveyor-general; that said Bashford arrived at Tucson, Ariz. (about 43 miles north of the land in controversy), January 25, 1864, and that his office was opened at said place January 25, 1864.

The defendants further aver that the office of surveyor-general of Arizona was abolished by operation of the act of July 2, 1864 (13 Stat., 344), and the said Territory thereupon became a part of the surveyor-general's district of New Mexico. But between the dates of June 2, 1863, and July 2, 1864, the surveyor-general within whose jurisdiction the land involved is situate was the surveyor-general of Arizona (Levi Bashford) and not the surveyor-general of New Mexico (John A. Clark), and that it devolved upon the former, not the latter, in the first instance at least, to pass upon the character of the land selected.

Defendants aver that all of the facts material and necessary to a proper consideration and understanding of the correspondence set forth in paragraphs 13, 14, 15, and 16 of said bill do not appear therefrom nor from said bill, in this: That the letter of April 2, 1864, addressed to the Commissioner of the General Land Office by John A. Clark, surveyor-general of New Mexico, was, as appears by indorsement upon the original letter on file in the General Land Office, written in Washington and was received at said General Land Office April 4, 1864, and the certificates of the register and receiver, dated March 25, 1864, were not received by the Commissioner of the General Land Office until May 26, 1864, and were not considered by said commissioner, nor were their contents within his knowledge at the time he wrote his said letter of April 9, 1864, aforesaid.

They also aver that said certificates of said register and receiver were accompanied by a letter of which the following is a copy:

SANTA FE, N. MEX.,
March 27, 1864.

W. WRIGHTSON, Esq.

DEAR SIR: You will please find inclosed the certificate of the register and receiver that the location made in Arizona is vacant and not mineral, so far as the records of their office show. I hope this certificate will enable you to get the location confirmed. With kind regards, I remain,

Yours, etc., JOHN S. WATTS.

Defendants aver that said letter of April 9, 1864, was not an adjudication of the passing of title or of the character of the land, as the commissioner had no information as to the latter; that the directions therein given for the survey of the "float" was in the light of and in pursuance of the suggestion of Surveyor-General Clark in his letter of April 2, 1864, received as hereinbefore stated, April 4, 1864, when he declined to certify as to the character of the land, saying: "Those facts can only be determined by *actual examination and survey.*"

And defendants further answering aver that neither the Land Department nor the heirs of Baca understood or believed that said letter of April 9, 1864, had the effect of or was intended to pass or vest title to any lands whatsoever in the heirs of Baca or any other persons: and that, referring to said so-called location No. 3, on April 30, 1866, John S. Watts, as agent for the heirs of Baca, addressed the following letter to the Commissioner of the General Land Office:

> WASHINGTON CITY, *April 30, 1866.*
>
> Hon. J. M. EDMUNDS,
>
> *Commissioner of Land Office.*
>
> SIR: You will find, by reference to the papers on file in your office, that on the 17th of June, 1863, I filed with the surveyor-general of New Mexico an application for the location of one of the five locations confirmed to the heirs of Luis Maria Cabaza de Baca under the tenth section of the act of Congress approved June 21, 1860. I further state that the existence of war in that part of the Territory of Arizona

and the hostility of the Indians prevented a personal examination of the locality prior to the location, and not having a clear idea as to the direction of the different points of the compass, when the subsequent examination of the location was being made by Mr. Wrightson, in order to have the location surveyed, it was found that the mistake made would result in leaving out most of the land designed or intended to be included in said location. Mr. Wrightson was killed by the Indians, and no survey has been made because of said mistake in this initial point of location. Under these circumstances I beg leave to ask that the surveyor-general of New Mexico be authorized to change the initial point so as to commence at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence from said beginning point north 12 miles 36 chains and 44 links, thence east 12 miles 36 chains and 44 links, thence south 12 miles 36 chains and 44 links, thence west 12 miles 36 chains and 44 links to the place of beginning. I beg leave further to state that this land which will be embraced in this change of the initial point is of the same character of unsurveyed vacant public land as that which *would have been set apart* by the location as first solicited, but is not the land intended to have been covered by said location, but the land to be included within the boundaries above designated is the land that was intended to be located and was believed to have been located upon until preparations were made to survey said location. Under

this state of the case it is hoped that directions will be given to the surveyor-general to correct the mistake.

Yours, respectfully,

JOHN S. WATTS,
Attorney for heirs of
Luis Maria Cabaza de Baca.

They further aver that thereafter, and under date of May 21, 1866, the following letter was sent to the surveyor-general of New Mexico by the Commissioner of the General Land Office:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 21, 1866.

JOHN A. CLARK, Esq.,
Surveyor-General, Santa Fe, N. Mex.

SIR: On the 9th of April, 1864, instruction was issued by this office to Levi Bashford, surveyor-general of Arizona, for the survey of one of the five locations confirmed to the heirs of Don Luis Maria Baca under the sixth section of the act of Congress approved June 21, 1860.

The starting point of this location of the claim was to be a point 1½ miles from the base of the Salero Mountain, in a direction north 45 degrees east of the highest point of said mountain.

The original instructions as aforesaid have been this day *returned to this office* by John S. Watts, attorney for heirs of Luis Maria Cabaza de Baca, dated April 30, 1866, together with a diagram of the intended location, but erroneously described by him in his application of the 17th June, 1863, addressed to you as the

surveyor-general of New Mexico. The papers thus returned are herewith transmitted to you with directions that you cause the survey to be executed in accordance with the amended description of the beginning point which is described in Mr. Watts's application of the 30th April last, *provided* by so doing the outboundaries of the grant thus surveyed will embrace *vacant lands* not mineral.

I am, very respectfully,

J. M. EDMUNDS,
Commissioner.

Mr. Clark's reply was as follows:

FREEPORT, ILL.,
June 11, 1866.

Hon. J. M. EDMUNDS,
Commissioner of the
General Land Office,
Washington, D. C.

SIR: I have the honor to acknowledge the receipt to-day of your letter of May 21, 1866, inclosing instructions for the survey of the third of the series of the Luis Maria Baca grants, confirmed by the sixth section of an act of Congress approved June 21, 1860, and directing me to cause the survey to be executed in accordance with the amended description of the beginning point, described in the application of the Hon. John S. Watts of 30th April last, which is also inclosed.

Hon. John S. Watts, attorney for the heirs of Luis Maria Baca, has applied to me to cause the said third location to be surveyed, and proposes to deposit the estimated cost of survey and office work as required by law.

I have estimated the cost of the work as follows:

Fifty miles of exterior boundary, at $15 per mile	$750.00
Office work	150.00
Total	900.00

And have directed him to deposit said sum with the Treasurer of the United States in Washington to the credit of the appropriation which may be designated by you.

Upon receipt of advice from your office that said sum of money has been deposited for the purposes aforesaid, I will enter into contract with a deputy surveyor for the survey of said grant in accordance with your instructions of 9th April, 1864, and 21st May, 1866.

Very respectfully, your obedient servant,

JOHN A. CLARK,
Surveyor-General for the
District of New Mexico.

Following this, the commissioner wrote as follows to said Watts:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
July 2, 1866.

JOHN S. WATTS, Esq.,
Attorney for heirs of
Luis Maria Baca, Washington, D. C.

SIR: Your letter of the 29th ultimo has been duly received. Agreeably to your request that I indicate the place where to deposit the requisite fund to cover the expenses of survey of the third location of the heirs of Luis Maria Baca, situated in the Territory of Arizona, I have to inform you that the surveyor-general

of New Mexico and Arizona, under date of the 11th ultimo, submitted to this office an estimate for the same as follows:

First. For survey of the location in the field	$750.00
Second. For office work	150.00
Total	900.00

As you prefer to make the deposit in the city of Washington, I have to designate the U. S. States [*sic*] Treasurer as the proper officer with whom you may deposit $750 on account of the survey of the third location of the claim of the heirs of Luis Maria Baca in Arizona Territory under act of Congress approved June 2, 1862, United States Statutes at Large, volume 12, page 410, and $150 on account of office work incidental to the survey, to be placed to the credit of the appropriation of $1,000 "for compensation of the clerks in the office of the surveyor-general of Arizona," approved June 25, 1864. You will please transmit a duplicate certificate of the deposit to this office. Whereupon the surveyor-general of New Mexico and Arizona will be advised of the deposit having been made, and he will contract for the survey of the grant under our instructions of April 9, 1864, and partly amended on the 21st May last.

I am, very respectfully, your obedient servant,

J. M. EDMUNDS,
Commissioner.

Defendants aver that no deposit as called for and required by said correspondence was ever made, and through failure to make such deposit, and for other

reasons later to appear, no survey was made until on or after June 17, 1905; that continuously for many years after 1866 it was understood by the heirs of Baca and all persons claiming under them and by the Land Department that the location of the claim known as No. 3 was that designated in the letter from John S. Watts, of April 30, 1866, *supra;* that the letter of April 9, 1864, was returned to the General Land Office by said Watts and the directions therein changed and amended by the letter of May 21, 1866, aforesaid, containing the provision that in running the outboundaries of the tract only vacant and non-mineral lands were to be embraced; that thereafter the heirs and assigns of said Baca, alleging the land included in the location to be mineral in character and therefore not such land as they were entitled to select, repeatedly requested permission of the Land Department to make a relocation of this third float; and under date of August 15, 1877, J. H. Watts wrote the Commissioner of the General Land Office as follows:

SANTA FE, N. MEX., *August 15, 1877.*

COMMISSIONER GENERAL LAND OFFICE,

Washington, D. C.

DEAR SIR: I have the honor to request that you will give me the permission to relocate Baca Float No. 3, which was located by my father in Arizona on land supposed to be vacant and not mineral, but which location was disapproved by your office on account of its being mineral or for absence of proof that it was not mineral. The Baca heirs sold this to

my father (Hon. John S. Watts, deceased), and I am at present the attorney for all his heirs as well as part owner myself, and I respectfully request that you will aid me in getting it relocated for our benefit on lands vacant and not mineral. We now suppose its location to be on mineral lands.

Very respectfully, yours,

J. H. WATTS.

And defendants have been informed and believe, and therefore aver, that said J. H. Watts was, as he asserted, a successor by inheritance to a share in such rights in said float as the said John S. Watts possessed at the time of his decease.

To said letter the Commissioner, on September 20 1877, replied as follows:

J. H. WATTS, Esq.,

Santa Fe, N. Mex.

SIR: I am in receipt of your letter of 15th ultimo, requesting permission as attorney for the heirs of John S. Watts, and also as part owner, to relocate Baca Float, No. 3, located in Arizona, which said location, as alleged by you, was disapproved by this office for want of proof that the land was nonmineral in its character.

In reply, you are informed that the records of this office show that said location, which was made upon the application of John S. Watts, attorney for the heirs of Luis Maria Cabaza de Baza, dated June 17, 1863, and approved by the surveyor-general of New Mexico on same date, has not been sur-

veyed, for the reason it appears that the claimants failed to deposit the necessary funds to pay the expenses of the survey, as required by the act of June 2, 1862, which in this case was estimated to be $900. This, however, at the present time is no obstacle to the execution of the survey, because the said act of June 2, 1862, was repealed by the act of February 28, 1871.

Some correspondence has been had by this office relative to the character of the land embraced in said location, whether the same was nonmineral, as required by the sixth section of the act of June 21, 1860, but I do not find that said location was disapproved by this office, but on the other hand instructions were subsequently given, May 21, 1866, for the survey, according to the amended application of Mr. Watts, of April 30, 1866.

The sixth section of the act of June 21, 1860, provides "That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Begas, to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number, and it shall be the duty of the surveyor-general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: *Provided, however*, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer."

It will be observed that the proviso to the said sixth section limits the right to locate to three years, and no longer, from the date of the act of June 21, 1860, which, having expired by limitation, this office can not authorize a relocation of Baca Float, No. 3, without special legislation of Congress to that effect.

This view of the case is sustained by the act of Congress approved June 11, 1864, by which the heirs of Luis Maria Baca were authorized to withdraw the location therefor made by them on the Pecos River, adjoining the Fort Sumner Reservation, and to select and relocate the same in manner provided by the said act of June 21, 1860, at any time before the 21st June, 1865.

This act may be accepted as the legislative interpretation of said act of June 21, 1860.

Respectfully,

J. A. WILLIAMSON, *Commissioner.*

On October 10, 1877, the department was addressed by Charles D. Poston, a representative of the claimants, as follows:

FLORENCE, ARIZ.,
10 October, 1877.

COMMISSIONER GENERAL LAND OFFICE,
Washington, D. C.

SIR: I beg leave to state that under authority of an act of Congress approved the 21st day of June, 1860, for the benefit of the heirs of Luis Maria Baca, that location No. 3 was made in the valley of the Santa Rita Mountains, in what is now designated on the map as Pima County, Ariz., about 10 miles east of township

21 south, range 13 east; that the persons engaged in making the survey of said location were killed by the Apache Indians and the records and field notes relating to the same were lost or destroyed; that subsequent to said location and survey minerals have been discovered upon said location, and various persons and companies are now engaged in hunting for gold, silver, and other precious metals within the boundary of said survey, to the ouster of the owners, their heirs and assigns; that in consequence of this circumstance the owners solicit permission and authority to relocate said land elsewhere upon the public domain, not mineral, in accordance with the terms and intention of the original act granting this privilege.

In support of this application you are respectfully referred to a precedent established by an act of Congress approved the 11 June, 1864, entitled "An act to amend an act to confirm certain private land claims in the Territory of New Mexico."

It will not be necessary here to recapitulate the ancient possession of the ancestors of Luis Maria Baca of the place called "Las Vegas," in New Mexico, and of their ejectment therefrom in violation of their legal rights and the treaty between Mexico and the United States, nor the recognition and attempted reparation of that wrong by the act of Congress referred to, approved the 21 June, 1860, as these matters are of public record particularly pertaining to the archives of the General Land Office at Washington.

The object of the present application is to obtain permission upon presentation of proper documents to relocate said land beyond the boundaries of any mining district, military reserve, Indian reservation, railway reservation, or private land claim if such location be possible in the Territories of New Mexico and Arizona, where seven-eighths of the available land is covered by some one or the other of these claims and reservations.

I am, dear sir, very respectfully, your obedient servant,

CHARLES D. POSTON,
Assignee of the Heirs of Luis Maria Baca.

The defendants have been informed from records in the General Land Office, and believe, and therefore aver, that said Charles D. Poston, as early as 1865, and at the date of said letter, was an agent of the Baca heirs and of John S. Watts, their assignee; that said Poston was, in the year 1857 and for some time thereafter, operating certain mining properties within the area covered by said attempted selection of June 17, 1863, and also within the boundaries of the attempted selection as amended in the year 1866; that said Poston, some time in 1858 or thereabouts, sold an interest in said mining claims to Wrightson & Co.; and that this Wrightson was the person to whom was addressed the letter of March 27, 1864, written by John S. Watts, inclosing the certificates of the register and receiver, as appears on page 19 of this answer; and that he was the same Wrightson to whom said Watts referred in his letter of April 30, 1866,

requesting the change in the initial point of the location of said Float No. 3.

In further answer, that the court may be fully advised of the history of this case in its material aspects, since April 9, 1864, the defendants aver that some time in 1882 the then claimant of successorship to whatever rights the Baca heirs and their assigns possessed, memorialized Congress for permission to relocate Baca Float No. 3; that during the second session of the Forty-seventh Congress a bill was introduced in the Senate of said Congress, by request of John C. Robinson or his representatives, the said Robinson then and there claiming to be the owner of said float under a chain of title proceeding from John S. Watts aforesaid, to permit said Robinson, as grantee and assignee of the heirs of Baca, to take in lieu of said location public land scrip to the extent of the acreage involved in the location in controversy, the said scrip to be located upon any public land unoccupied, and not mineral, within New Mexico, Arizona, "or elsewhere;" that the said bill failed of passage, but was again introduced "by request," in the first session of the Forty-eighth Congress; that in both said bills the facts recited included the statement that the "one-fifth of the grant of land" in lieu of which public land scrip was to be issued "has not yet been located;" that said bill was adversely reported upon by the Senate committee to which it was referred at the second session of the Forty-eighth Congress, and finally failed of passage. Whereupon, under date of February 13, 1885, the said John C.

Robinson applied to the Commissioner of the General Land Office for leave to relocate said grant, in the following language:

> SIR: In accordance with the terms of the treaty of Guadalupe Hidalgo, all that territory known as New Mexico, formerly belonging to Mexico, was ceded to the United States.
>
> In accordance with the terms of that treaty, the act of Congress approved June 21, 1860, was passed, by which the heirs of Luis Maria Baca were authorized to select 500,000 acres of nonmineral land in the Territory of New Mexico.
>
> On May 1, 1864, the heirs of Baca conveyed to John S. Watts their interest above named.
>
> On January 8, 1870, John S. Watts sold and conveyed to Christopher E. Hawley the interest of Baca's heirs in 100,000 acres of said land, which interest had been conveyed to him (Watts).
>
> On January 13, 1870, Hawley executed a power of attorney to James Eldredge, authorizing him to sell the property described in the conveyance made by Watts to him (Hawley).
>
> On July 7, 1879, James Eldredge conveyed said property or interest, as attorney for Hawley, to John C. Robinson, of the State of New York, the present owner.
>
> A certified copy of the deed from the Baca heirs to Watts, as recorded in New Mexico, and the originals of the deed from Watts to Hawley, of the power of attorney from Hawley to Eldredge, and the deed from Eldredge to Robinson are in the possession of Robinson, and will be filed for examination if called for.

On June 17, 1863, John S. Watts, attorney for the heirs of Baca, notified the surveyor-general of New Mexico that a certain tract of land in the vicinity of Tubac, Ariz., had been selected as one of the tracts confirmed to said heirs. This location was approved by the surveyor-general and the approval transmitted to the General Land Office, and on April 9, 1864, the surveyor-general of Arizona was instructed to have said location surveyed.

On April 30, 1866, John S. Watts filed an amended description of the aforesaid selection, which was also approved by the surveyor-general and forwarded to the General Land Office to have the survey conform to the amended description. The survey was never made, and could not be made, on account of the hostility of the Indians.

Since that date no definite action towards the location has been taken by the land office, *nor could the location selected have been confirmed*, for the reason that the land was mineral land.

And now John C. Robinson, the present owner of the interest of the said heirs of said Baca in one-fifth of said grant of 500,000 acres, namely, 100,000 acres, asks that he may be authorized to locate the same on land non-mineral in that part of the United States which was known as being in the Territory of New Mexico on June 21, 1860.

Very respectfully, your obedient servant,

JNO. C. ROBINSON.

CHARLES A. ELDREDGE,
WM. W. BELKNAP,
Attorneys for Jno. C. Robinson.

With reference hereto, the General Land Office, on March 12, 1885, issued the following instructions:

> DEPARTMENT OF THE INTERIOR,
> GENERAL LAND OFFICE,
> *Washington, D. C., March 12, 1885.*
> UNITED STATES SURVEYOR-GENERAL,
> *Santa Fe, N. Mex.*
>
> SIR: On the 13th ultimo, Jno. C. Robinson filed in this office his application as owner, to relocate Baca Float No. 3, located in Arizona.
>
> [Then follows a copy of the sixth section of the act of June 21, 1860, and a recitation of the selections of June 17, 1863, and of April 30, 1866.]
>
> It is set forth in Mr. Robinson's application that the present selection of this claim is upon lands mineral in character, and there is sufficient evidence of that fact on file in this office.
>
> By reference to a decision rendered by my predecessor, September 27, 1877, upon the application of J. H. Watts, to relocate this claim, it will be found that the application was rejected for the reason that the sixth section of the act of June 21, 1860, "limits the right to locate to three years and no longer" from the date of the act. That period having expired by limitation, it was held that this office could not "authorize a relocation of Baca Float No. 3 without special legislation of Congress to that effect."
>
> My predecessor, however, seems to have been governed in said decision by the fact that Congress, by act of June 11, 1864, had authorized the *claimants of Baca No. 2* to withdraw the location already made by them and to

select and relocate the same in the manner prescribed by the act of June 21, 1860, at any time before the 21st of June, 1865. Indeed, it is explicitly stated in the decision that this latter act must be accepted as the legislative interpretation of the act of June 21, 1860.

Acting, no doubt, upon this authoritative suggestion, Mr. Robinson, the grantee and assignee of the heirs of Luis Maria Baca, in December, 1883, offered bill S. 79 in the Congress of the United States, authorizing and directing the Secretary of the Interior to issue to said Robinson, his heirs and assigns, public land scrip to the extent and in lieu of the one-fifth of the grant of land provided for in the act of Congress approved June 21, 1860, aforesaid.

The Senate Committee on Private Land Claims on the 23d of January, 1885, reported adversely upon said bill, and asked to be discharged from further consideration of it, assigning as reasons therefor that the committee was unable to discover any obligations resting upon Congress for additional legislation in relation to the claim; that the acts of Congress already passed upon the subject afforded ample opportunity for the parties *to have availed themselves* of the right thereby given; and that if the parties have complied with the law, as alleged, no additional legislation is necessary.

This legislative interpretation of the act of June 21, 1860, would seem to counteract and overrule to a great extent the interpretation thereof upon which my predecessor's decision of September 27, 1877, was based and to relegate the subject for consideration under the

provisions of the act and the compliance therewith by the parties in interest, no action outside of the said decision of September 27, 1877, upon the application to relocate the claim having been taken by this office.

The express provisions of the act would seem to comprise a *right* on the part of the heirs and a *duty* on the part of the surveyor-general. The act assigns to heirs of Baca the *right* to select and locate a certain quantity of land of certain character and in prescribed form, and makes it the *duty* of the surveyor-general to survey and locate said land *when required by the heirs.*

There is also a limitation in the act, and it becomes of vital importance to inquire to what particular feature of the act the limitation has reference: "*Provided, however,* That the *right* hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer."

If therefore the above interpretation of the act be correct, the *right* of the heirs was simply to select and locate a certain quantity and character of land in square bodies in the Territory of New Mexico, and it would seem that the limitation in the act applies to these particular acts of selection and location and not to the duty enjoined upon the surveyor-general, whenever called upon by the heirs for the performance of it.

The question therefore naturally arises whether the parties in interest have brought themselves sufficiently within the limitation of the act to justify a reselection or location as prayed for in the petition.

It is evident that within the time prescribed, their selection was made in the proper territory and in the proper form. The quantity within their selection was approximately determined, but the character of the land was subsequently found to be mineral, and the location therefore not in accordance with the provisions of the act; and I apprehend that this fact could only be conclusively determined *at the time of final location and survey* in the field by the surveyor-general, *when the title passed.*

To hold that the limiting clause in the act had reference to the completion of the claim by the location and actual survey thereof by the surveyor-general in the field would have placed the power in this office, or in the surveyor-general to defeat, either by accident or design, the object of the act.

Upon such considerations I am of the opinion that it can not be consistently held that the heirs of Baca have forfeited their rights in this case under the limiting clause of the act, which is entirely remedial in its nature and under the circumstances continuous in its operation.

The present location of the claim is therefore rejected for the reason that the lands embraced are mineral in character and not subject to selection and location under the act, and a reselection and location is hereby allowed.

Several deeds of conveyance in the case have been filed here; but it is not incumbent upon this office to pass upon their legality or effect upon the new location when made.

Sufficient, however, is shown, in my judgment, to authorize John C. Robinson to make the relocation in accordance with the terms of the act, and leave the question of present title for settlement by the courts.

You will therefore notify the said John C. Robinson that he, or his properly constituted attorney in fact, will be allowed to reselect in the name of the *heirs of Luis Maria Baca* the lands to which they, the said heirs of Baca, are entitled under the aforesaid act, in any part of the Territory of New Mexico as constituted at the date of the act, and in accordance therewith as near as may be, and in such a manner as not to interfere with any existing valid prior rights acquired by others under any of the laws provided for the disposal of the public lands of the United States.

Please acknowledge the receipt of these instructions.

Respectfully,

L. HARRISON,
Acting Commissioner.

The defendants aver that said ruling, solicited by the claimants concerning the rights vested in the heirs of Baca, was subsequently vacated by the department; that on July 13, 1886, William A. J. Sparks, Commissioner of the General Land Office, overruled, reversed, and declined to follow the ruling aforesaid, and held that he had no power to permit a relocation; that John C. Robinson, claimant as aforesaid, thereafter appealed to the Secretary of the Interior, pro-

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testing against the views and refusal of Commissioner Sparks to allow the relocation; that on June 15, 1887 (5 L. D., 705), the Secretary of the Interior held that the action of Commissioner Harrison of March 12, 1885, was without authority and therefore void, and that the claimants must be held to the location of June 17, 1863, as amended April 30, 1866; that thereafter said Robinson requested that a survey be ordered and stated that a deposit would be made to cover the cost thereof, and on March 5, 1889, the office of surveyor-general of Arizona having been again created, the Commissioner of the General Land Office directed the surveyor-general of Arizona to order a hearing to determine the known character of the land as of the date of selection prior to making any survey of the outboundaries, unless, in the course of such hearing, a survey was rendered necessary in the ascertainment of the exact location of mines with reference to said outboundaries, ruling in said decision that—

> In these cases the title passes upon the approval of the survey of the claim by the surveyor-general.

Whereupon said Robinson appealed to the Secretary of the Interior, who, on June 24, 1891, affirmed the action of the commissioner in ordering said hearing. (12 L. D., 676.)

On August 10, 1891, said Robinson moved for a rehearing on his appeal and for a review of said decision, the said motion being overruled by the Secre-

tary of the Interior November 28, 1891. (13 L. D., 624.)

On June 9, 1893, John W. Cameron, alleged to be one of the owners of the claim, made a formal written demand on the surveyor-general of Arizona to survey the amended location, and on June 17, 1893, as shown by records of the Department of the Interior, the said surveyor-general declined to grant the application for the following reason:

> I personally know the land to be mineral in character, and assert that it would have so appeared to original claimants in making the selection if they had acted in good faith. The selection having been made in direct violation of the act referred to, it is in no way incumbent upon this office to further consider the matter.

The defendants aver that during all of said time from April 30, 1866 to July 25, 1899, the land claimed by the heirs of Baca or their alleged assigns was that embraced by the amended location of April 30, 1866, and no assertion or claim whatsoever was made during said time to the lands covered by or included in the attempted selection of June 17, 1863; that the so-called amendment of location, as heretofore shown, was by changing the initial point, and was supposed to be, as represented, an amended rather than a substantial relocation; that on May 6, 1899, the Commissioner of the General Land Office transmitted to this department an application of the then alleged owners for the survey of said float; that on

July 25, 1899 (29 L. D., 44), the department ruled that claimants were bound by the selection of June 17, 1863, and could not be allowed to take under the application of April 30, 1866, because it appeared that the amended location was sought not by reason of a mistake in the initial point but was a complete change of location (29 L. D., 44). Prior orders for a hearing as to the character of the land were vacated and the surveyor-general of Arizona was directed to make survey and to investigate and determine the character of the land as the work of the survey progressed in the field. The question of certain conflicting grants, to wit, the Tumacacori, Calabazas, and San Jose de Sonoita grants, then arose, as a considerable part of each of said grants embraced lands within the exterior lines of the attempted selection of June 17, 1863.

Defendants aver that these grants had been made by the Mexican Government at a time prior to cession of the Territory of New Mexico by the treaty of Guadaloupe Hidalgo and the so-called Gadsden purchase, said treaties (9 Stat., 229–230 and 10 Stat., 1035) providing that the property of Mexicans in said Territory should be "inviolably respected." Whereupon, under the terms of the act of July 22, 1854 (10 Stat., 308), cited in the third paragraph of plaintiff's petition, the surveyor-general of that district was instructed to ascertain the origin, nature, character, and extent of all claims to land under the laws, usages, and customs of Spain

and Mexico, and to report thereon, said report ultimately to be laid before Congress, "and, until final action of Congress on such claims, all lands covered thereby," the act provided, "shall be reserved from sale or other disposal by the Government, and shall not be subject to the donations granted by the previous provisions of this act."

Defendants aver that the Tumacacori and Calabazas grants were based on sale of said lands by the treasury department of the State of Sonora, April 18, 1844; that under the act above cited a petition for confirmation of these grants was filed June 9, 1864, and the surveyor-general of Arizona, before whom the matter properly came, recommended confirmation of said grants. Proceedings looking to such confirmation were instituted in the Court of Private Land Claims (act of March 3, 1891, 26 Stat., 854) and resulted in a decree that the sale aforesaid was void for want of authority in the treasury department of Sonora to make it. On appeal to the Supreme Court the decree below was affirmed (*Faxon* v. *United States*, 171 U. S., 244).

Defendants aver that the San Jose de Sonoita grant, also in part in conflict with said selection of June 17, 1863, was based upon a sale of the land involved by the Mexican Government in 1821; that a petition for its confirmation was filed with the surveyor-general of Arizona December 30, 1879; that a suit involving its validity was instituted in the Court of Private Land Claims aforesaid and resulted in the rejection

of said claim; that on appeal to the Supreme Court of the United States, said court in part reversed the decree below and sustained the grant to the extent of one and three-fourths sitios (*Ely's Admr.* v. *United States*, 171 U. S., 220); and that the grant thus sustained is in part situated within the exterior boundaries of the said selection of June 17, 1863. Wherefore, in view of these premises and of the act of July 22, 1854, *supra*, the Secretary of the Interior, on June 30, 1900 (30 L. D., 97), ruled that the lands embraced by said grants were, on the 17th day of June, 1863, by virtue of the eighth section of said act of July 22, 1854, reserved from any disposition or appropriation until the validity or invalidity of said grants or claims to said grants was finally determined; that the attempted selection or location of June 17, 1863, was therefore as to these lands ineffective and void, said lands not being "vacant land" within the meaning of the sixth section of the act of June 21, 1860.

Defendants aver that thereafter James W. Vroom and John Watts, two of the plaintiffs in this action, petitioned the department for leave to be heard on all matters presented in the departmental decisions of July 25, 1899, and June 30, 1900, aforesaid, representing that they alone were the owners of said float under a conveyance or conveyances, dated October 26, 1899, from the heirs of said John S. Watts, and denying all claims of title asserted by others under conveyances from said John S. Watts or his heirs; that while asserting that the question of the true ownership of said float was not a matter within the

jurisdiction of the land department they insisted that they were entitled to be heard upon the controverted questions respecting said float, notwithstanding the presentation and argument thereof by others theretofore and then asserting claims of ownership. Accordingly the Department of the Interior, on September 29, 1900, granted said petition and suspended further action under the departmental decisions aforesaid. Thereupon said Vroom filed a brief and argument in support of the claim and contention of himself and said Watts. The whole subject was then the subject of another decision by the Secretary of the Interior, March 5, 1901 (30 L. D., 497), in which it was held that final action by the Government could not be taken until survey, investigation, and determination as to the known character of the land at the time of selection was made by the surveyor-general in the first instance; and that for reasons heretofore given the lands embraced by these grants in conflict (to wit, the Tumacacori, Calabazas, and San Jose de Sonoita claims) were not subject to selection under the act of June 21, 1860. A motion for rehearing and review, filed by another claimant of said float, was denied June 1, 1901.

Defendants aver that prior to ordering a survey of said float by the decisions heretofore mentioned, of July 25, 1899, and June 30, 1900, the then grant claimants had offered to deposit to the credit of the Government an amount of money necessary to pay the cost of survey, asking to be notified of the amount, which was done; that subsequently nothing was done

by said claimants, in this behalf, to secure the survey, and on April 16, 1902, the Secretary of the Interior directed the Commissioner of the General Land Office to furnish claimants with an estimate of the cost of survey and call upon them to deposit the same to the credit of the surveyor-general, or within sixty days to show cause, if any, against said requirement. On July 21, 1902, said Vroom, in behalf of himself and said Watts, protested to the surveyor-general of Arizona against being required to deposit any more money than enough to pay for the survey of the exterior lines. On October 31, 1902, this protest was dismissed by the Secretary of the Interior and the commissioner was directed to notify claimants to make the deposit within ninety days from notice, and that in default thereof the land department would proceed to adjudicate and determine all claims that might be presented for lands situate within the exterior limits of the selection of June 17, 1863, and alleged to have been occupied, reserved, or known to be valuable for minerals at the date of said selection.

Defendants aver that due notice in accordance with the above instructions was given the claimants of the Baca interests, and that said ninety days expired March 3, 1903; that said claimants neglected and failed to comply with the order; that during the time that the float had been in controversy, and particularly during that period when the Baca claimants were claiming under the so-called amended selection of April 30, 1866, rather than the earlier selection of June 17, 1863, many adverse claims,

under the homestead law and otherwise, had been initiated, particularly in that part of the float location of June 17, 1863, covered by the Tumacacori, Calabazas, and San Jose grants aforesaid; that a full list of said entries or private claims, as shown by the records of the General Land Office, is hereto attached and marked "Exhibit A" and made a part of this answer. ("H. E.," meaning homestead entry; "M. E.," meaning mineral entry; and "C. E.," meaning cash entry.)

Defendants further aver that a survey was necessary not only to determine definitely the exterior lines of the float claimed by the Baca heirs or assignees, but to demarcate the lines of the conflicting grants of Tumacacori, Calabazas, and San Jose de Sonoita, and particularly needful in the adjudication of minor adverse claims. They also aver that the float claimants failed to deposit the cost of survey and were in default after said March 3, 1903; but that in August, 1903, John M. Robinson, then appearing as a claimant of the Baca interest, asked a suspension of proceedings under the said ruling of October 31, 1902, and action was suspended for sixty days from notice. Finally, on November 10, 1904, the Baca claimants, still being in default, the Commissioner of the General Land Office represented to the Secretary of the Interior that there were many pending cases involving homestead applications where the land was known to have been reserved to satisfy certain private land grants at the time of the selection of June 17, 1863, and that as the location of said

selection was not definitely known ("there being here only an office diagram prepared showing the approximate or supposed location of the float"), it was impracticable to attempt to determine in some cases whether said land involved in the homestead applications was within or without the lines of the location of June 17, 1863. Wherefore, said commissioner recommended:

> For the purpose of administering the public land laws and in order that applicants under said laws may be forced to no unnecessary trouble, expense, or delay in perfecting titles to which they believe they have a right under the general land laws, the exterior boundaries of Baca float No. 3 should in my opinion be surveyed and connections of the same made with the other grants in conflict therewith whether the latter be confirmed or finally rejected.

For these reasons he asked permission to cause a survey of said float and the conflicting private land grants to be made. Thereafter, on December 28, 1904, the Secretary of the Interior directed said survey to be made and for the reasons assigned by the commissioner. Defendants aver that the survey so ordered was not at the instance of the Baca claimants nor the survey mentioned in the granting act of June 21, 1860, but was a public survey ordered in the regular course of business of the Interior Department. Provision was made in said letter ordering the survey to cover the case of the Baca claimants, i. e., "When the grant claimants apply for patent to such of the lands within said boundaries as may appear upon

investigation to be of the character of lands subject to selection under the act of June 21, 1860 (12 Stat., 71), the cost of such survey must be demanded of them as a condition precedent to the issuance of the patent."

In pursuance of these instructions, defendants aver, the surveyor-general of Arizona caused a survey to be made (from November 3 to December 23, 1905), through contract entered into with Philip Contzen, deputy surveyor, June 17, 1905; the plats and field notes whereof were duly filed in the office of the surveyor-general November 23, 1906. Said plat shows the exterior lines of said float and the lines of the conflicting grants, as well as a tract of land in the northeast portion of the grant, containing 8,656 acres of land distinctly mineral in character and alleged to have been known as such by the claimants at the time of selection. Said survey also developed the fact that the conflicting Tumacacori, Calabazas, and San Jose grants contain 30,408.83 acres within the exterior lines of the float. Said survey also shows that said selection embraces 125.60 acres of the town site of Tubac, a settled community prior and subsequent to 1860.

Defendants aver that said surveyor-general, while said survey was in progress, made examination of the character of the land and took evidence of the known character prior to 1863; that this obligation was imposed upon him because no surveyor-general within whose jurisdiction said float was situated had ever, at any time, affirmatively reported that the land was of a

character such as the heirs of Baca were entitled to select, and, moreover, the last report of Surveyor-General John A. Clark, in his letter, dated April 2, 1864, *supra*, had distinctly reported that "those facts (i. e., whether the land was vacant and not mineral) could only be determined by actual examination and survey."

Defendants aver that said surveyor-general of Arizona, in view of such examination and of the testimony adduced, on November 5, 1906, reported to the Department of the Interior his recommendation that the selection be rejected on its entirety as not being subject to the provisions of the act of June 21, 1860, his said report being hereto attached and marked "Exhibit B" and made a part of this answer.

Defendants aver that on May 7, 1907, the claimants under the float selection, including the plaintiffs in this action, as well as those claiming in opposition thereto, were heard orally by the Commissioner of the General Land Office, plaintiffs in addition thereto submitting written arguments and briefs. On May 13, 1907, the General Land Office rendered its decision, adverting to the fact that the survey in question had been made, not for the private purpose of the claimants, but for the purpose of enabling the General Land Office properly to administer the public land laws. The commissioner of said office called attention to the fact that although notified by the surveyor-general said claimants (these plaintiffs) had failed to submit evidence as to the character of any portion of the tract; wherefore said commissioner ordered that the surveyor-general should notify the said claimants that

sixty days from notice would be allowed them to introduce any evidence tending to disprove the prima facie showing as to the known character of the land on June 17, 1863; that in default thereof the said findings of the surveyor-general would be accepted as correct and the entire selection finally rejected.

Defendants aver that claimants (these plaintiffs) thereupon appealed to the Secretary of the Interior, who, on June 2, 1908, rendered a decision, a copy thereof being hereto attached, marked "Exhibit C," and made a part of this answer.

Thereafter a motion for review was filed, and on December 5, 1908, the Secretary of the Interior overruled said motion, a copy of his decision being hereto attached, marked "Exhibit D," and made a part of this answer.

The defendants aver that under the procedure of the Department of the Interior the said motion for review suspended the operation of the order aforesaid allowing the Baca claimants leave to apply for a hearing, and that the sixty days allowed for such purpose did not commence to run until service upon them of notice of the denial of their motion for review; that in the meantime, the restraining order issued in this cause suspended all proceedings in said Department of the Interior, so that the matter remains unadjudicated and can not be finally determined until the court shall discharge the said restraining order; whereupon, if the Baca claimants shall make application for said hearing, the same will be ordered and the plaintiffs have due and full opportunity to offer evidence, if any they have, tending

to prove that on June 17, 1863, the tract claimed, or any part or parts thereof, was or were vacant and nonmineral, and if any part thereof shall be found to have been in fact vacant and not known to have been mineral when said application to make said location was made, proper proceedings will be taken to evidence the final passing of title thereto to the heirs of Luis Maria Baca or their grantees.

Further answering, defendants aver that the legal title to said land so attempted to be selected and located still remains in the United States and within the exclusive jurisdiction of the Department of the Interior, and that for that reason the plaintiffs can not maintain their suit or have any of the relief for which they pray.

The defendants further aver that ever since the said application to make location was tendered the United States has claimed the legal title to the said land and is a necessary party to the determination of the issues presented herein; but inasmuch as the United States has not been made a party hereto, and in any event has not given its consent to be sued in the premises, the complainants can not maintain this suit or have any of the relief for which they pray.

The defendants, further answering, say that the information contained in the documents and official papers hereinbefore set forth indicates fraud in the attempt to make said float location No. 3 upon the land in question, inasmuch as it is suggested that John S. Watts, who acted as attorney for the Baca heirs in making said selection, was well aware that

the land, or a large part thereof, was known valuable mineral land, or occupied or claimed by others as aforesaid, and that, unless at a hearing had pursuant to the leave granted the Baca claimants it should be determined that the tract in question, or some part or parts thereof, was or were vacant and not known to have been mineral at the time the said selection was made, it would be the duty of these defendants to decline and refuse to take or suffer any proceedings in the Department of the Interior whereby title in the Baca claimants would in anywise be evidenced or confirmed; and these defendants are advised, and therefore aver, that even had proceedings been had at the time the location was made, whereby the legal title would pass to the Baca heirs, the United States would not be barred from raising the question of fraud and procuring the cancellation of such proceedings, and that therefore the granting of the relief prayed by the complainants would be to adjudicate title in the heirs of Baca as against the rights of the United States, without the United States being a party to these proceedings.

The defendants, further answering, say that, as suggested by the pleadings, the real purpose of this suit is to recover certain real estate in the Territory of Arizona by trial of the legal title thereto; that the cause of action is palpably legal, not equitable, and that this court, sitting as a court of equity, is without jurisdiction to hear and determine the controversy, and that if complainants have any right to said real property, or to the relief for which they pray, it must be asserted, if at all, in a court of law;

that the facts that they are not and never have been in possession, and that, as they aver, there are entrymen in possession of tracts within the outboundaries of the location which they claim, suggest a proper action at law, before a court of competent jurisdiction, whereby their alleged title may be duly tried; that those parties who, as aforesaid, have instituted claims within said float, and especially the inhabitants of the town site of Tubac and the owners of the San Jose de Sonoita claims, are necessary parties to this bill and are not in court; and for these and for other reasons set forth in defendants' demurrer to this bill, they say that plaintiffs can not maintain their suit or have any of the relief for which they pray.

And now having answered, these defendants pray to be dismissed hence, with their reasonable costs and charges in this behalf most wrongfully sustained.

RICHARD A. BALLINGER.
FREDERICK DENNETT.

By their Solicitors:

_____,
Assistant Attorney-General for the Interior Department.

_____,
United States Attorney.

_____,
First Assistant Attorney, Interior Department.

_____,
Assistant Attorney, Interior Department.

Exhibit A.

MEMORANDUM OF ENTRIES WHOLLY OR PARTLY WITHIN THE EXTERIOR LIMITS OF BACA FLOAT NO. 3, ARIZONA.

Tucson H. E. 3001, January 27, 1899, Timoteo Fierros, E. ½ of NE. ¼ and N. ½ of SE. ¼ sec. 7, T. 23 S., R. 14 E., 160 acres.

Tucson H. E. 3005, January 27, 1899, Joaquin S. Acevedo, SE. ¼ of SE. ¼ sec. 7, SW. ¼ of SW. ¼ sec. 8, N. ½ of NW. ¼ sec. 17, T. 23 S., R. 14 E., 160 acres.

Tucson H. E. 3007, January 27, 1899, Francisco A. Acevedo, lot 4 and E. ½ of NW. ¼ and SW. ¼ of NE. ¼ sec. 7, T. 23 S., R. 14 E., 159.47 acres.

Tucson H. E. 3008, January 27, 1899, Cornelio S. Acevedo, NE. ¼ sec. 17, T. 23 S., R. 14 E., 160 acres.

Tucson H. E. 3011, January 30, 1899, Isabella N. Mercer, E. ½ of NE. ¼ sec. 27, E. ½ of SE. ¼ sec. 22, T. 22 S., R. 13 E., 160 acres.

Tucson H. E. 3012, January 30, 1899, Morgan R. Wise, NE. ¼ of SE. ¼ sec. 27, W. ½ of SW. ¼ and SE. ¼ of SW. ¼ sec. 26, T. 22 S., R. 13 E., 160 acres.

Tucson H. E. 3013, January 30, 1899, George W. Atkinson, SW. ¼ of SE. ¼ sec. 35, T. 22 S., R. 13 E.; N. ½ of NE. ¼ and SW. ¼ of NE. ¼ sec. 2, T. 23 S., R. 13 E., 160 acres.

Tucson H. E. 3014, January 30, 1899, Edwin Egan, SW. ¼ of NW. ¼ and NW. ¼ of SW. ¼ sec. 1, SE. ¼ of NE. ¼, NE. ¼ of SE. ¼, sec. 2, T. 23 S., R. 13 E., 160 acres.

Tucson H. E. 3015, January 30, 1899, Thomas D. Casanegra, N. ½ of SW. ¼, SE. ¼ of SW. ¼, NW. ¼ of SE. ¼, sec. 35, T. 22 S., R. 13 E., 160 acres.

Tucson H. E. 3017, January 30, 1899, Jose Altamirano, SE. ¼ of SE. ¼ sec. 35, T. 22 S., R. 13 E., 40 acres.

Tucson H. E. 3018, January 30, 1899, Joseph E. Wise, E. ½ of NW. ¼, W. ½ of NE. ¼, sec. 35, T. 22 S., R. 13 E., 160 acres.

Tucson H. E. 3019, January 30, 1899, Guadalupe Vasquez, E. ½ of SW. ¼, W. ½ of SE. ¼, sec. 1, T. 23 S., R. 13 E., 160 acres.

Tucson H. E. 3020, January 30, 1899, Francisco Q. Accvedo, E. ½ of NW. ¼, S. ½ of NE. ¼, sec. 1, T. 23 S., R. 13 E., 160.12 acres.

Tucson H. E. 3021 (Phoenix 01791), January 30, 1899, Benjamin Acevedo, E. ½ of SE. ¼ sec. 1, T. 23 S., R. 13 E., 80 acres.

Tucson H. E. 3024, February 2, 1899, Henry Ohm, N. ½ of SE. ¼, SE. ¼ of SE. ¼, NE. ¼ of SW. ¼, sec. 9, T. 22 S., R. 13 E., 160 acres

Tucson H. E. 3025, February 2, 1899, Francisco Moreno, E. ½ of NE. ¼, NE. ¼ of SE. ¼, sec. 13, T. 23 S., R. 13 E., NW. ¼ of SW. ¼ (lot 3), sec. 18, T. 23 S., R. 14 E., 159.54 acres.

Tucson H. E. 3026, February 3, 1899, John A. Lucas, W. ½ of NW. ¼ sec. 35, T. 22 S., R. 13 E., 80 acres.

Tucson H. E. 3029, February 6, 1899, David J. Cumming, S. ½ of SW. ¼, sec. 15, E. ½ of NW. ¼, sec. 22, T. 22 S., R. 13 E., 160 acres.

Tucson H. E. 3030, February 6, 1899, F. C. 1384, September 30, 1904, Roman Ramirez, SE. ¼ of NE. ¼, NE. ¼ of SE. ¼, sec. 31, SW. ¼ of NW. ¼, NW. ¼ of SW. ¼, sec. 32, T. 21 S., R. 13 E., 160 acres.

Tucson H. E. 3034, February 7, 1899, George R. McCorkle, NE. ¼ of sec. 12, T. 23 S., R. 13 E., 160 acres.

Tucson H. E. 3028, February 10, 1899, Fidel Silbas, W. ½ of SE. ¼, sec. 2, T. 23 S., R. 13 E., 80 acres.

Tucson H. E. 3043, February 13, 1899, William H. Walker, E. ½ of NW. ¼, W. ½ of NE. ¼, sec. 27, T. 22 S., R. 13 E., 160 acres.

Tucson H. E. 3044, February 13, 1899, Harvey S. Walker, SW. ¼ of sec. 22, T. 22 S., R. 13 E., 160 acres.

Tucson H. E. 3056, February 20, 1899, Lorenzo Aguayo, S. ½ of NE. ¼, SE. ¼ of NW. ¼, NE. ¼ of SW. ¼, sec. 5, T. 22 S., R. 13 E., 160 acres.

Tucson H. E. 3070, March 17, 1899, Tirso Trujillo, S. ½ of SE. ¼, NW. ¼ of SE. ¼, sec. 27, T. 22 S., R. 13 E., 120 acres.

Tucson H. E. 3045 (Phoenix 0390), February 13, 1899, Robert J. Goode, S. ½ of NE. ¼, W. ½ of SE. ¼, sec. 22, T. 22 S., R. 13 E., 160 acres.

Tucson H. E. 3089, April 11, 1899, Leon Silvas, N. ½ of SW. ¼, sec. 15, T. 22 S., R. 13 E., 80 acres.

Tucson H. E. 3028, February 1, 1899, Demetrio Barrios, NW. ¼, sec. 9, T. 22 S., R. 13 E., 160 acres.

Tucson H. E. 3072, March 20, 1899, Jose Maria Valdez, NE. ¼ of sec. 34, T. 22 S., R. 13 E., 160 acres.

Tucson H. E. 3073, March 22, 1899, Antonio Moreno, lots 3 and 4 and S. ½ of NW. ¼, sec. 2, T. 23 S., R. 13 E., 160.96 acres.

Tucson H. E. 3077, March 23, 1899, Apolonio Valdez, S. ½ of SW. ¼, sec. 32, T. 21 S., R. 13 E., and lots 3 and 4, sec. 5, T. 22 S., R. 13 E., 160.43 acres.

Tucson H. E. 3078, March 24, 1899, Francisco Moreno, W. ½ of NW. ¼, sec. 22, E. ½ of NE. ¼, sec. 21, T. 22 S., R. 13 E., 160 acres.

Tucson H. E. 3084, March 29, 1899, Josephine A. Saxon, W. ½ of NE. ¼, E. ½ of NW. ¼, sec. 31, T. 22 S., R. 14 E., 160 acres.

Tucson H. E. 3086, April 6, 1899, Lucia J. Sykes, NW. ¼ of NW. ¼ (lot 4), sec. 1, T. 23 S., R. 13 E., 40.10 acres.

Tucson H. E. 3121, July 1, 1899, Tangino Sanchez, SW. ¼ of SW. ¼, sec. 35, SE. ¼ of SE. ¼, sec. 34, T. 22 S., R. 13 E., 80 acres.

Tucson H. E. 3130, July 10, 1899, Manuel Contreras, NE. ¼ of sec. 9, T. 22 S., R. 13 E., 160 acres.

Tucson H. E. 3301, May 14, 1900, Phoenix F. C. 149, July 25, 1907, John F. Black, SE. ¼ of NE. ¼, sec. 19, S. ½ of NW. ¼, and SW. ¼ of NE. ¼, sec. 20, T. 21 S., R. 13 E., 160 acres.

Tucson H. E. 3987, September 6, 1901, Phoenix F. C. 159, August 8, 1907, Manuel King, S. ½ of SW. ¼, sec. 29, N. ½ of NW. ¼, sec. 32, T. 21 S., R. 13 E., 160 acres.

Tucson H. E. 4039, November 5, 1901, Santiago Madril, SW. ¼ of NE. ¼, SE. ¼ of NW. ¼, NE. ¼ of SW. ¼, NW. ¼ of SE. ¼, sec. 31, T. 21 S., R. 13 E., 160 acres.

Tucson H. E. 4106, January 24, 1902, Antonio Ruiz, SW. ¼ of NW. ¼, NW. ¼ of SW. ¼, sec. 5, T. 22 S., R. 13 E., 80 acres.

Tucson H. E. 4339, November 28, 1902, Phoenix F. C. 299, June 12, 1908, Jose Villa, SE. ¼ of SW. ¼, SW. ¼ of SE. ¼, sec. 19, NW. ¼ of NE. ¼, NE. ¼ of NW. ¼, sec. 30, T. 21 S., R. 13 E., 160 acres.

Tucson H. E. 4576, May 22, 1903, Raymond H. y Samano, SW. ¼ of SE. ¼, sec. 5, N. ½ of NW. ¼, and NW. ¼ of NE. ¼, sec. 8, T. 23 S., R. 13 E., 160 acres.

Tucson H. E. 4694, September 5, 1903, Phoenix F. C. 292, June 2, 1908, Francisco Arballo, SE. ¼ of SW. ¼, sec. 5, T. 22 S., R. 13 E., 40 acres.

Tucson H. E. 4755, October 26, 1903, Alberto Madril, SE. ¼ of SE. ¼, sec. 31, T. 21 S., R. 13 E., lot 1, sec. 6, T. 22 S., R. 13 E., 80.56 acres.

Tucson H. E. 5020, August 24, 1904, Phoenix F. C. 034, July 3, 1908, Walter E. La Plante, W. ½ of SE. ¼, sec. 17, T. 21 S., R. 13 E., 80 acres.

Phoenix H. E. 1753, June 15, 1908, Miguel Sinohui, NE. ¼ of SW. ¼, sec. 29, T. 21 S., R. 13 E., 40 acres.

Tucson T. C. E. 948, March 27, 1890, Jose A. Burruel, W. ½ of SE. ¼, sec. 17, T. 21 S., R. 13 E., 80 acres. In conflict with Tucson H. E. 5020, Phoenix F. C. 034.

All of above are unpatented and are suspended because of Baca float No. 3.

Phoenix mineral entry 421, February 5, 1908, survey 2376, sec. 13, T. 21 S., R. 14 E., 12.190 acres, Alfred S. Donau. Pending in division P for investigation.

M. E. 125, M. A. 19, secs. 19 and 24, T. 21 S., R. 14 E., suspended on account of Baca float No. 3.

M. E. 405, M. A. 297, survey 2385, sec. 12, T. 21 S., R. 14 E., and sec. 7, T. 21 S., R. 15 E., 55.096 acres, Joplin Mining Company, October 15, 1907 (Joplin and Missouri lodes), Phoenix. Suspended on account of conflict with Baca float No. 3.

Min. Sur. 2423, M. A. 349, secs. 24 and 25, T. 21 S., R. 14 E., and sec. 30, T. 21 S., R. 15 E., 61.983 acres, Charles H. Ferry (Columbia and other lodes), Phoenix, March 10, 1908. No papers in division N.

M. E. 126, M. A. 20, Phoenix, secs. 11, 12, 13, and 14, T. 21 S., R. 14 E. Suspended on account of conflict with Baca float No. 3.

Phoenix M. E. 139, sec. 12, T. 21 S., R. 14 E. Suspended on account of conflict with Baca float No. 3.

Phoenix M. E. 307, serial 01227, S. ½ sec. 12, T. 21 S., R. 14 E. In division D, awaiting further action.

M. E. 138, sec. 13, T. 21 S., R. 14 E. Suspended on account of conflict with Baca float No. 3.

Florence Cash, No. 140, November 14, 1878, Francisca Day, administratrix of the estate of John Day, deceased, NE. ¼ of sec. 30, T. 22 S., R. 15 E., 160 acres, patented December 30, 1879.

Florence Cash, No. 175, March 30, 1880, Robert V. Bloxton, S. ½ of SW. ¼, S. ½ of SE. ¼, sec. 20, T. 22 S., R. 15 E., 160 acres, patented January 23, 1897.

Tucson C. E. 214, June 14, 1882, John S. Wood, as probate judge, in trust for the occupants of Tubac town site, SW. ¼ of SW. ¼, sec. 8, SE. ¼ of SE. ¼, sec. 7, NE. ¼ of NE. ¼, sec. 18, NW. ¼ of NW. ¼, sec. 17, T. 21 S., R. 13 E., 160 acres, patented December 30, 1884.

Tucson C. E. 298, August 10, 1885, Thomas J. Moraghan, W. ½ of NE. ¼, sec. 19, T. 21 S., R. 13 E., 80 acres, patented April 19, 1897.

Tucson C. E. 208, February 27, 1882, Henry B. Guinn, NW. ¼ of SW. ¼, sec. 35, N. ½ of SE. ¼, NE. ¼ of SW. ¼, sec. 34, T. 22 S., R. 14 E., 160 acres, patented January 29, 1897.

Tucson C. E. 207, February 27, 1882, George W. Stevens, NW. ¼ of SW. ¼, sec. 34, N. ½ of SE. ¼, SW. ¼ of NE. ¼, sec. 33, T. 22 S., R. 14 E., 160 acres, patented January 29, 1897.

Tucson C. E. 614, February 18, 1889, Thomas Forsyth, SE. ¼ of SE. ¼, sec. 33, S. ½ of SW. ¼, SW. ¼ of SE. ¼, sec. 34, T. 22 S., R. 14 E., 160 acres, patented June 29, 1891.

Tucson H. E. 661, September 27, 1886, F. C. 663, April 28, 1894, Jose Maria Mabis, SE. ¼ of SW. ¼, sec. 8, E ½ of NW. ¼, NE. ¼ of SW. ¼, sec. 17, T. 21 S., R. 13 E., 160 acres, patented May 22, 1895.

Tucson H. E. 693, December 28, 1886, F. C. 751, April 10, 1896, Luis Acuna, SE. ¼ of NE. ¼, E. ½ of SE. ¼, sec. 18, T. 21 S., R. 13 E., 120 acres, patented July 9, 1896.

Tucson H. E. 1441, October 16, 1890, F. C. 746, March 11, 1896, Sarah E. Burruel, SW. ¼ of sec. 17, T. 21 S., R. 13 E., 160 acres, patented July 31, 1896.

Tucson H. E. 3027, February 3, 1899, F. C. 1320, November 5, 1903, Maria Low, NE. ¼ of SE. ¼, sec. 30, NW. ¼ of SW. ¼, W. ½ of NW. ¼, sec. 29, T. 21 S., R. 13 E., 160 acres, patented October 10, 1905.

Tucson H. E. 3031, February 6, 1899, F. C. 1338, February 3, 1904, Ynez Andrez, E. ½ of SE. ¼, sec. 19, W. ½ of SW. ¼, sec. 20, T. 21 S., R. 13 E., 160 acres, patented January 30, 1905.

Tucson H. E. 3035, February 7, 1899, Phoenix F. C. 290, June 2, 1908, Carmen Mendez, N. ½ of SE. ¼, SE. ¼ of SE. ¼, S. ½ of SW. ¼ of SE. ¼, E. ½ of NE. ¼ of SW. ¼ of SE. ¼, W. ½ of NW. ¼ of SW. ¼ of SE. ¼ of sec. 30, and N. ½ of NE. ¼, sec. 31, T. 21 S., R. 13 E., 150 acres, patented December 14, 1908.

Tucson H. E. 3051, February 16, 1899, F. C. 1217, September 22, 1902, Tomas Cota, NE. ¼ of NE. ¼, S. ½ of NE. ¼, NW. ¼ of SE. ¼, sec. 30, T. 21 S., R. 13 E., 160 acres, patented May 27, 1903.

Tucson H. E. 3300, May 14, 1900, F. C. 1029, July 5, 1900, Mary L. Tenley, NE. ¼ of NE. ¼, sec. 19, N. ½ of NW. ¼, NW. ¼ of NE. ¼, sec. 20, T. 21 S., R. 13 E., 160 acres, patented December, 17, 1900.

PRIVATE LAND CLAIMS IN PARTIAL CONFLICT.

San Jose de Sonoita Grant, 5,123.42 acres, confirmed by the Court of Private Land Claims under the act of March 3, 1891 (26 Stat., 854), patented October 29, 1906. For full history of this grant see decision of the Secretary of the Interior dated March 26, 1906 (34 L. D., 506).

Tumacacori and Calazas grants, rejected by the United States Supreme Court, October term, 1897. See *Faxon* v. *United States* (171 U. S., 244) for full history of grants.

The extent of these conflicts is shown on the plat of survey of Baca float No. 3.

GOVERNMENT RESERVATIONS IN CONFLICT.

E. ½ of NW. ¼ of SW. ¼ of SE. ¼, and W. ½ of NE. ¼ of SW. ¼ of SE. ¼, sec. 30, T. 21 S., R. 13 E., 10 acres, withdrawn by proclamation of President, September 15, 1908, act of June 8, 1906, for "Tumacacori National Monument."

Secs. 1 to 12, inclusive, and N. ½ of secs. 13 to 18, inclusive, T. 21 S., R. 14 E., in Santa Rita National Forest. See executive proclamation of May 27, 1907. In conflict as to approximately the S. ½ of S. ½ of S. ½, secs. 7 to 12, inclusive, and as to the N. ½ of secs. 13 to 18, inclusive.

Secs. 1 to 15, inclusive, N. ½ sec. 16, N. ½ sec. 17, N. ½ sec. 18, secs. 22 to 27, inclusive, secs. 34, 35, and 36, T. 21 S., R. 15 E., in Santa Rita National Forest. Same proclamation as above. In conflict as to part of secs. 7, 8, 17, and N. ½ sec. 18.

Exhibit B.

REPORT OF SURVEYOR-GENERAL INGALLS.

OFFICE OF UNITED STATES SURVEYOR-GENERAL,
Phoenix, Ariz., November 5, 1906.

Referring again to your letter "E," dated July 21, 1905, detailing me, as an examiner of surveys, to investigate and determine the character of the lands to be embraced within the boundaries of the Baca float No. 3, as required by the act of Congress of June 21, 1860 (12 Stats., 71), and in conformity with departmental decision of March 3, 1901 (30 L. D., 497–504), I have to report as follows:

On June 17, 1905, I entered into a contract on behalf of the United States, designated as No. 136, with Philip Contzen, deputy surveyor, providing for the survey of the exterior boundaries and accessory lines of the Baca float No. 3, having previously given notice of the proposed survey and investigation for a period of sixty days in one newspaper of general circulation in the vicinity of the land, and in one newspaper of general circulation throughout Arizona, and advised by registered mail all parties shown by the records of this office to be interested.

On October 24 I was informed by Deputy Contzen that he had reached Tubac and his survey of the exterior boundaries of the grant was progressing to such an extent that I could determine upon the ground, during the progress of the survey, the lands to be embraced within said float, as per the agreement of contract No. 136 and special instructions issued thereunder.

On the evening of October 31, 1905, I left Phoenix for Nogales, Ariz., the county seat of Santa Cruz County, where it was my intention to examine the records of mines of said county before proceeding to the lands to be surveyed, and take the testimony of several parties resident thereof whom I knew were old settlers in southern Arizona and conversant with the character of the lands (prior to June, 1863) of the

southern slope of the Santa Rita range of mountains in the vicinity of Salero and Salero Hill, Deputy Contzen having previously informed me that, from reconnoissance surveys, the north boundary of the float would be located about 1¾ miles north of the summit of Salero Hill, and about 1 mile north of the Hacienda de Salero.

On my arrival at Nogales (located on the border between the United States and Mexico), I located Mr. Thomas Gardner, who is 82 years old and almost blind. Mr. Gardner is held in high esteem, by those who are fortunate enough to know him, as a man of honesty and integrity beyond question. By his affidavit you will observe that he has lived in the vicinity of Patagonia (which settlement is about 6 miles east of the east boundary of the Baca float No. 3) for nearly fifty years, and testifies that he is intimately acquainted with the country contiguous and adjacent to Patagonia for from 40 to 50 miles. At Nogales I also took the testimony of J. C. Dobbins, John Morrison, Allen T. Bird, whose affidavits are herewith transmitted as Exhibits Nos. 4, 3, and 7, in the order of their respective names, and before leaving Nogales made a thorough search of the records of mines of Santa Cruz County, for dates of location and description and locus of claims, in the vicinity of Salero, Salero Hill, San Cayatana Mountains, and Tubac (the latter place by the present survey being situated almost entirely within the limits of this grant).

On November 10, after having been in Nogales nine days, taking depositions and examining public records, I drove to Calabasas, 9 miles distant, and en route made inquiry of all the old inhabitants, with the hope of finding some of them who were conversant with the character of the country prior to June, 1863, but without success. At Calabasas I found and examined the ancient remains and ruins of the hacienda Gondara, and the site of an old military post, once known as Fort Mason. The ruins of the hacienda indicate that the buildings were constructed of adobe (sun-dried bricks) and were built around a square. Two of the buildings are still standing, and are occupied by a Mexican and his family. The remains of Fort Mason consist of stone foundations of buildings extending in a row along the bluffs facing a creek, and distant therefrom about one-fourth of a mile. Further mention and reference will be made to these ruins later on in this report.

On my return to Calabasas I took the testimony of Mr. George Atkinson, a farmer and stock raiser in this community, whose affidavit is transmitted. On November 13, 1905, I left Calabasas and drove to Tubac, taking the road down the Santa Cruz Valley, on the left bank of the Santa Cruz River, which said river traverses the entire length of the float. This road traverses the western slope of the San Cayatano Mountains, which are situated in the approximate center of the float. I carefully examined the country en route, especially any old prospect shafts, tunnels, and ground workings. On reaching Tubac I made a thorough and careful examination of the village, particularly an old fort (uninhabited) or "presidio" and other buildings, particularly as to the probable time of their erection, based upon their present condition. I returned to Calabasas by the road leading up the right side of the river and the valley, stopping at the old Fort Tumacacori Mission for the purpose of inspecting the ruins, and especially the remains of some old furnaces, slag piles, etc., referred to in the several affidavits and extracts herewith. In the rear of the ruins of these former buildings on the opposite side of the road I found, badly scattered over the ground, large quantities of slag and a large mound, which was evidently the remains of a furnace for smelting ore; much slag, melted and burnt stone were visible. Mesquite trees about 12 inches in diameter were found growing amongst the slag quite abundantly, and their growth would indicate that they were 35 or 40 years old. (See photographs.)

From this point I proceeded down the valley to the ranch and residence of Joseph King (an old settler), whose testimony was taken and is submitted herewith as Exhibit No. 8; thence back to Calabasas.

On the next day, November 15, I proceeded to Salero, examining the entire character of the country to the east of the San Cayetano Mountains, and embraced within the boundaries of the Baca float No. 3, several old arastras (crude mineral rock crushers), and the remains of an old smelting furnace, in the vicinity of the latter. Much slag was in evidence. Arriving at the old hacienda, I made a careful examination of the old buildings, particularly as to their state of preservation, and the probable date of their erection. The old graveyard in this vicinity was examined, particu-

larly the graves of Grosvenor and Stack, they being the only ones with marked monuments and bearing date 1861 and 1860, respectively.

Leaving the hacienda on horseback, I made a thorough examination of the country contiguous thereto, and surrounding the Salero Hill, which contains numerous old workings; examined many witnesses and old mine workings, several of which indicate that they were excavated fifty to seventy-five years ago. The remains of many arastras are evident in this vicinity, some of which are in a fair state of preservation; others are barely distinguishable. Photographs thereof inclosed.

I also found the ruins of many patios (inclosures for storing ore), some of which are in a fair state of preservation.

The country surrounding Salero Hill is conspicuously mineralized, and a person not conversant with the surface character of a mineral belt can not fail to observe the existence of precious minerals, for its presence is apparent everywhere. Many mineral ledges traverse the country and bold mineral outcrops are apparent even to a layman.

After a careful examination of the entire country embraced within the present survey by Mr. Contzen, excepting the lands embraced within the Tumacacori, Calabasas, and Sonoita claims, I am of the opinion that the lands are *mineral* in character, and were undoubtedly known to be mineral at the time of the location of the float—June 17, 1863.

The surface indications surrounding Salero Hill—old arastras, haciendas, and patios—show beyond doubt that this portion of the float was occupied by miners and prospectors before and at the time the float was located; the old workings, which are abundant, and in which crude tools have been found, conclusively show that the country was worked profitably for its mineral at that time and years before, and if the party or parties who located its boundaries, as per their denouncement of the lands they desired to select under the act of Congress of June 21, 1860, *supra*, made such denouncement after carefully, or even casually, examining the country, they knew a greater portion, if not all of the same, was occupied and was mineral in character, excepting the lands immediately adjacent to the Santa Cruz River, which were in a state of reservation by virtue

of the location of the unconfirmed Tumacacori and Calabasas grants, and I am satisfied in my own mind that the passing of title to the grantee's heirs of any of the lands included in this survey, and particularly those lands in the northeast corner thereof, surrounding Salero Hill, which I instructed Deputy Contzen to segregate by instructions dated June 17, 1905, would be a great injustice, not only to those who are developing this country and extracting valuable mineral therefrom at the present time as grantors or heirs of former occupants, but an injustice to those who have passed within the great beyond, who sacrificed their lives at the hands of the bloodthirsty Apaches in the development thereof, long before the Baca heirs dared attempt the perpetration of this fraud on these hardy pioneers and blazers of the western trail. Perhaps, like coyotes in the night, they sneaked into this country after an Apache raid, or before a prospective one, and found the inhabitants had fled temporarily, and they then proclaimed the country vacant, unoccupied, and nonmineral.

Passing to the testimony taken by me and submitted herewith, it is fortunate, indeed, for the Government that several of the deponents whose testimony is so valuable are still living and recall, as far back as the year 1858, the character of the major portion of the country embraced within the present surveyed boundaries of this float. They are herewith submitted, as follows:

EXHIBIT NO. 9.—AFFIDAVIT OF THOMAS GARDNER.

My name is Thomas Gardner; age 82. I reside at Patagonia, in Santa Cruz County, Ariz. I have lived in the vicinity of Patagonia nearly fifty years and am well acquainted with the country for from 40 to 50 miles in that vicinity. I first visited the Salero in 1857 with a Mexican guide. I found three tunnels and ore shaft. There were also some old slag piles, arastras, and some ore at the grass roots. There was too much water in the tunnels for me to examine them. I was induced to visit the vicinity because of reports that had reached me at Tubac of the richness of the Salero mine. I had heard of these mines before leaving California. The country, including the Santa Rita range, was considered the richest in the southwest at that time. There were a great many mines opened up in the Santa Rita Mountains in 1858. The district embracing the Salero mine was known in 1858

as the "Wrightson mining district." It was named for Mr. Wrightson, who was working the Salero mine at that time, and, I believe, is now called the "Tyndall district." Mr. Wrightson remained there until the civil war broke out, when he left for the States, returned later and was killed by Indians. The Montezuma mine is situate about 2 or 3 miles south of the Salero Hill and was being worked in 1858, and is still worked and known by the same name. There is a well-defined mineral zone running through the Santa Rita Mountains with numerous outcroppings with many prospect holes showing mineral, and this was well known in 1857–58.

Between 1857 and 1863 the valley of the Santa Cruz River above and below Calabasas was occupied by settlers who claimed title under Mexican and Spanish land grants.

EXHIBIT NO. 12.—AFFIDAVIT OF GEORGE ATKINSON.

My name is George W. Atkinson, aged 60 years. I reside at Calabasas, in what was formerly Pima County, but now Santa Cruz County, Ariz. I have lived there with my family since January 1, 1879. I am engaged in the business of farming and stock raising, and have been so occupied since my settlement at this place. I came here in the first instance under a contract with the then owners or claimants of the Calabasas and Tumacacori grants to manufacture brick and erect a hotel. I completed this contract by making the brick and erecting the hotel building, which is a two-story structure with porches and cost about $30,000, and is still standing and has been and is now occupied by the representatives of the grant claimants. Since the decision of the Supreme Court of the United States holding said grants from the Mexican Government to be illegal and void, the land upon which said hotel building stands was filed upon in June, 1900, in the land office at Tucson. In January, 1898, I filed upon the land upon which I have resided since coming to Calabasas. In order to make this land valuable for agricultural purposes I was compelled to reclaim it from its arid state, and to that end constructed ditches from Sonoita Creek, carrying the water from said creek to said land, and therewith irrigated the land.

In my business as a stock raiser I was compelled to, and did, ride over the country constantly and thoroughly, now claimed to be within the exterior lines of the Baca float No. 3, as well as the adjacent country. I have thereby acquired an intimate knowledge of practically every foot of said country. I am acquainted with all the hills, valleys, gulches, mountains, water places, and the people who reside on these lands. I first heard of the Baca float No. 3 in 1884. The information I then obtained concerning the claim was very slight and indefinite, and after careful inquiry found that no one living in the country knew anything about its location or where the

boundaries were supposed to be. The first intimation that I had that the float was located to cover the Santa Cruz Valley was in July, 1899. Prior to that time the surrounding settlements were discussing the location of the grant. The people at and about Crittenden claiming that it lay west of that place and on the western slope of the Santa Rita Mountains, while the occupants of said western slope asserted that it lay to the east of themselves.

That portion of the country included within the present-claimed lines of Baca float No. 3, lying in the valley of the Santa Cruz, is covered with farming settlements, and the evidence is clear and abundant that these settlements have existed for more than fifty years. These settlements, composed of families, have now and have had for more than fifty years, houses, corrals, fences, and irrigating ditches.

The Santa Cruz Valley is bounded by mountains, and these mountains contain minerals of great value. This is self-evident to anyone in passing over the country. The presence of deep shafts, large dumps, great piles of slag, and old arastras show conclusively that mining operations in these mountains and within the claimed lines of the Baca float No. 3 had been carried on very extensively and undoubtedly with profit, as they show large expenditures of time and money. These mines were worked years before 1863, as is shown by these excavations. The working of mines in and about Salero Hill in 1861 and thereafter is a matter of common knowledge among residents of the country.

I am acquainted with the San Cayetano Mountains, which lie near the center of the float. This mountain is about 8 miles long north and south and about 3 miles wide at its base. It is a fairly high mountain. The mountain is all mineral, and all about it, from its base to its summit, are evidences of large mining operations having been carried on, which are disclosed by shafts and large dump piles. They are still working said mines, and have been for many years.

In January, 1880, I, with others, met at the Lone Palm mine, which is situated south of Salero Hill, and within the lines of the float. This mine was worked in ancient times, as no one—not even Mexicans and Indians—is able to state when it was discovered or first worked. At this meeting we organized the Palmetto mining district, which includes a large portion of the southeast corner of the Baca float, with boundaries as follows: The Sonoita River on the north, the Santa Cruz River on the west, the international boundary line on the south, and the Patagonia Mountains on the east.

I served one term as member of the board of supervisors of Pima County. I was well acquainted with Charles D.

Poston, Peter R. Brady, and Peter Kitchen in their lifetime. All three are now dead. Joseph King is a neighbor of mine. All of the gentlemen named are men of unimpeachable integrity and veracity.

EXHIBIT NO. 8.—AFFIDAVIT OF JOSEPH KING.

My name is Joseph King, aged 71 years. I now reside and have resided on my ranch, about 800 yards east of the old Tumacacori Church or mission since April, 1865.

I came to his section of the country from California in October, 1864. My first occupation was working on a road leading from the Santa Cruz River to the Salero mine or hacienda, for and under the direction of Mr. Wrightson, who claimed to own the hacienda and the country about there. Later in the year I was employed by Mr. Wrightson, with many others, to make a survey of the country claimed by him. We commenced at a point about a mile and a half north of the Salero mine, and ran south several miles, near to Sonoita, then ran east, then north, and then west to the foot of the mountain opposite the Canoa. A heavy snowstorm came on and we quit the work and returned to the hacienda at Salero on January 1, 1865. The work was in charge of a Doctor Locke as surveyor, afterwards a man named Herrick. Among the other workmen I recall the names of John T. Smith, Fred Brown, Frank Morehouse, Jack Nealy, B. Morehouse, Jack Aggers, all of whom were discharged soldiers.

When I settled on my ranch, in April, 1865, there were no people living in the valley of the Santa Cruz between Tubac and the mouth of the Sonoita. I understood at the time that the former inhabitants had quit the country because of the hostile Apaches. There were many houses standing in fields that were once cultivated, showing that the country had been occupied nearly as fully as it is at this time. There was a garrison at Tubac in 1864.

While I was employed at the Salero I saw the Salero mine and it had the appearance of having been worked many years before. It was not being worked at that time. There was another mine near the Salero called the Chenango. There was also a prospect hole or cut far up on the side of the Salero Mountain.

Mr. Wrightson was killed near Fort Buchanan by Apaches, in February, 1865. Near to the hacienda were old slag piles and old Mexican furnaces and arastras. I have seen at the Tumacacori mission old slag piles with mesquite trees growing up through them. There was an abundance of water at the hacienda, but as to other parts of this country I am not sure that there is running water, except in the wet or winter season.

I knew Mr. Charles D. Poston in his lifetime. I also knew Sabino Otero. He was living near Tubac then and is still living there.

EXHIBIT NO. 1.—AFFIDAVIT OF WILLIAM McCOY.

William W. McCoy, being first duly sworn, deposes and says that he is now a resident of the city of San Bernardino, Cal., and has been for forty years last past; that he is now of the age of 76 years; that he went to Tubac, Ariz., in March of 1857, and remained there in said vicinity until March, 1860; that when deponent went to said Tubac one Charles D. Poston was operating certain mining properties in the Santa Rita Mountains for himself and others; that said Poston sold a one-half interest in said mining properties to one Wrightson & Co. in 1858, and after such sale said Poston hired deponent to take ten (10) men and build houses, in order that they might be ready for occupation upon the arrival of said Wrightson; that during said year of 1858 said Wrightson came to Arizona and entered upon work in the mines aforesaid, and deponent was employed by said Wrightson as superintendent, and deponent continued in such capacity for a period of about eighteen months thereafter, working upon the "Salero," "Ohero," and other mines, which properties had been previously worked by Mexicans, as reported to deponent, and as he verily believes, during the time the country belonged to Mexico; that said Wrightson & Co. also owned and worked the old "Mission Tumacacori," having bought it from a priest in Hermosillo, and got title to 1 league of land that had been given to a Jesuit priest by the King of Spain, as reported to deponent and as he verily believes; that said mines are located in said Santa Rita Mountains, about 15 miles in a westerly direction from the town of Patagonia and about 28 miles in a northerly direction from Nogales; that said mining district was known in 1858 among the mining people as the "Wrightson mining district," having been named for Mr. Wrightson, who was working the "Salero" mine at the time, and I understand that said district is now known as the "Tyndall mining district;" that the "Montezuma" mine is situated in the same district and mineral zone, about 2 or 3 miles south of the "Salero" Hill and was being worked in 1858, and the last I knew of it, it was still being worked; that there is a well-defined mineral zone running through the Santa Rita Mountains with numerous outcroppings, and many prospect holes were in existence, showing minerals, in 1857, and during the time that I was there were evidences of ancient workings for mineral in said mountains, which I personally saw; that the mineral zone and strike of the ledge through said mountains are such that a casual observer

could not help but be struck by their strength and evidences of mineral deposits; that said country during my stay there was well known throughout the entire part of that country at least as being rich in mineral deposits of various kinds, such as lead, silver, gold, and copper.

Deponent further says that during the time of his stay in and about said Santa Rita Mountains and Patagonia, the valley of the Santa Cruz River above and below Calabasas was occupied by settlers, who ranched and grazed the same and who claimed title thereto under Spanish and Mexican land grants.

Tubac, the village referred to by Mr. McCoy, is situated in the northwest corner of the float. The "Salero" and "Ohero" mines are both included in the segregated strip. The Wrightson mining district is now known as the Tyndall mining district, and includes the entire Baca float No. 3, which latter district was organized at Salero on the 17th day of November, 1876, described as follows:

This district shall embrace the following territory, to wit: Commencing at the highest Santa Rita peak, that is to say, the highest peak of the Santa Rita Mountains, in the county of Pima, Arizona Territory, and run thence west twelve (12) miles; thence south twenty (20) miles; thence east twelve (12) miles; thence north twenty (20) miles to the place of beginning, to wit, the highest peak of the said Santa Rita Mountains—

as certified to by Charles A. Shibell, county recorder of Pima County, in his affidavit dated November 13, 1905, and attached hereto as Exhibit No. 6.

EXHIBIT No. 2.—COPY OF AFFIDAVIT OF CHARLES D. POSTON.

(The original of which is now on file with the Interior Department.)

Charles D. Poston, being first duly sworn on oath, states that he is over 70 years of age; that he came to Arizona in the year 1854; that he came to this Territory for the purpose of working a mine near the town of Tubac, on the Santa Cruz River, known as the Cerro Colorado; that he was sent to Arizona by a company of capitalists; that his first operations were in the Santa Rita Mountains easterly from Tubac and northerly from Calabasas, but shortly after included the said Cerro Colorado mine, which was located west of the river; that his headquarters for many years was at Tubac and that he was well acquainted with the people who had settled in that vicinity and the topography of the country; that at that time what is known as the Salero Hills, which are a part of the Santa Rita range, and which include the westerly

and northerly and southerly slopes of that range, was the only known mineral lands within the borders of what is now Arizona; that that region had been worked for generations by those who preceded the Spaniards, and by the Spaniards and Mexicans; that the same were worked for lead and silver ores in the main; that the evidences of this working for ages was evidenced by shafts and drifts and tunnels and slag piles and the ruins of old arastras and adobe smelters; that the method of working was primitive, but that quite a large settlement of people and quite a number of laborers were constantly delving in these mountains, and while the profit to the individual was not large, in the aggregate the ores that were mined furnished a support to a community of about 150 people. He states that the whole Santa Rita range of mountains and the foothills at their base whenever the native rocks outcropped and clear to the immediate bluff of the Santa Cruz River, was the territory in which the miners worked, and that outcropping of the ores was to be seen here and there over that territory. He states that he was acquainted with John S. Watts, who was a Delegate to Congress from the Territory of New Mexico, which then included the Territory of Arizona; that the said Watts was well acquainted with the character of the lands included within Baca float No. 3, and its mineral character. Affiant states that 12 miles square, commencing at a point 1¼ miles from the base of the Salero Mountains north 45° east of the highest point of the same, thence west, south, east, and north 12 miles, would include a large portion of the said mineral lands. That said square would also include a large portion of the Santa Cruz Valley, including and below Calabasas. Affiant states that he was acquainted with Manuel Gandara, who had been governor of Sonora and a very distinguished citizen, soldier, and statesman; that from the time of the Gadsden purchase and many years afterwards said Gandara resided for quite a large portion of the time, off and on, near Calabasas, where he had a large hacienda composed of many buildings, corrals, and lands in cultivation, and a large retinue of soldiers and servants forming quite a village and settlement; that he had large herds of sheep and cattle, and factories for the manufacture of wool into fabric, and he then claimed to be owner of a large tract of land which included the valley of the Santa Cruz and Sonoita from a point several miles above Calabasas, and from a point up the Sonoita at the western terminus of the Sonoita Grant, down the valleys of both streams to their junction near Calabasas and down the Santa Cruz valley to a point near Tubac; that the said grant was claimed and known as Calabasas and Tumacacori land grant, and was claimed to include all the arable lands in the valley and all the grazing lands contiguous thereto.

That the said Calabasas grant, as the same was claimed by said Gandara and occupied and controlled by him, included more than the south and west half of the Baca float No. 3; that the hacienda of Gandara was occupied as aforesaid in June, 1863, and continued to be for years after. Affiant states that by reason of said Calabasas land grant the lands included within the boundaries of the claim were not subject to entry under the land laws of the United States, but were withdrawn from entry and continued so to be until within a year or so last past, when the Supreme Court of the United States finally decided against the validity of said grant. Affiant states that knowing the country as he did at the time and the boundaries of the location of Baca float No. 3, the same was evidently located to cover and include the only well-known mineral lands in the Southwest at that time, and the boundary could not have been selected as it was for any other purpose than to include the minerals for the reason that said lands had then no value for any other purpose.

That fact was apparent and well known to whoever was acquainted with the topography of the country and the character of that region. And further affiant saith not.

EXHIBIT No. 5.—AFFIDAVIT OF SABINO OTERO.

Sabino Otero, being first duly sworn, testified as follows: I am a resident of Tubac, in Santa Cruz County, formerly a part of Pima County, Ariz. I was born in said Tubac in 1844. In 1854 I was living in Tubac with the other members of my father's family. Some years thereafter, probably in 1861 or 1862, Charles D. Poston came there and established his headquarters in the old fort or presidio, the ruins of which are near the present schoolhouse of Tubac. He began operating mines in the vicinity quite extensively and continued to do so for five or six years, as I now remember. He was succeeded as manager of said mines by a man named Leadruff, I believe.

I am well acquainted with Salero Hill and its neighborhood. I have been for many years engaged extensively in the cattle business. My headquarters ranch is at Tubac. I am familiar with every portion of the country included within the supposed boundaries of the Baca float No. 3, having ridden over it in the business of looking after my cattle. Said float includes a large portion of the Sonoita grant, which has been decided to be a valid grant by the courts, a part of the Calabasas and Tumacacori grants, or possibly the whole of them. Also a large portion of the mineral country that has been known as mineral by everyone living in the country, from my earliest recollection, such as the Salero and the adjacent country.

The Calabasas grant was owned and occupied by Governor Gandara, a former governor of Sonora, who had large flocks of sheep thereon and cultivated the lands in the valley of the Santa Cruz. A German named Hulseman was his manager or major-domo.

The valley of the Santa Cruz has been occupied by farmers and raisers of stock since my earliest recollection. The country surrounding the Santa Cruz Valley is mountainous, and these mountains contain mines of mineral.

I was well acquainted with Wrightson, who was working mines at Salero Camp. I often saw him at Colonel Poston's office in the presidio at Tubac. I am not certain of the date when Wrightson first went to Salero, but think it was 1862. He continued to operate said mines until he was killed by the Indians, the exact date of which I can not fix.

From 1861 to 1863 the mines in that country were operated except when the miners were compelled to leave on account of the Apaches.

There is much evidence of mining having been carried on in the Santa Rita Mountains and in other parts of the country contained within this Baca float many years before the country passed under American control.

My father and my uncle informed me that ores from the Salero and Huebabi and other near-by mines were brought to Tumacacori and treated there. I have seen at the old mission piles of slag with large mesquite trees growing out of said slag piles, showing that the smelting occurred long ago—certainly before I was born. The Huebabi mine is located about 8 miles north of the old Huebabi mission, on a range of mountains between the Potrero Creek and the said mission and just south of old Fort Mason.

I have been acquainted with the settlers in the Santa Cruz Valley since boyhood, and I never heard mentioned by them of the Baca float until about 1899. If the Baca float No. 3 had been located on the ground in 1863, I, in common with my neighbors, would certainly have known it.

EXHIBIT NO. 14.—AFFIDAVIT OF GENS PETERSEN.

My name is Gens Petersen, aged 64 years; I reside at Salero, Santa Cruz County. By occupation I am a miner and prospector. I have resided here most of the time since 1878. I have followed my present occupation since 1878 in northern part of Santa Cruz County, and have prospected over the region about Salero for a distance of 10 or 20 miles. It is a rich mineral section, abounding in gold, silver, copper, and lead. I have discovered and sold three good mines and several others that were not so good. The outcroppings of the veins are plainly visible, being very bold. Many of the veins have as many as eight or ten claims upon each.

The general appearance of the country at Salero Hill and its vicinity conveys a clear impression of its mineral character. So clearly evident is the presence of mineral that a person unfamiliar with mineral land would know that the country is not agricultural but mineral land.

EXHIBIT NO. 3.—AFFIDAVIT OF JOHN MORRISON.

My name is John Morrison, aged 56 years; residence, Harshaw, Santa Cruz County, Ariz.; by occupation a miner and prospector. I have resided in the vicinity of Harshaw since 1881, and know the country in respect to its mineral character embraced in that portion of the Baca grant in the neighborhood of the Salero mine. I have followed the occupation of a miner in all of the States and Territories known as the Rocky Mountain region and the Pacific coast for about thirty-seven years. By the term "mining" I mean both labor in mines and in prospecting for mines. In the pursuit of my business I have discovered mines of gold, silver, lead, and copper, and have sold them. I consider myself, by reason of my long experience as a prospector, to be able to determine whether minerals are contained in the country or whether it is nonmineral land. In regard to character of the country for a radius of 10 miles from the Salero, I know it to be a good mineral region, with veins and outcroppings plainly visible, even to a person who knows but little of mining. I have seen many indications of former workings of mines, and while I do not know the date when they were worked it must have occurred twenty or more years before my arrival in the country. From my general knowledge of the country I regard the Santa Rita Mountains as a rich mineral region, containing gold, silver, copper, and lead, and particularly do I say this of the Tyndall district.

EXHIBIT NO. 7.—AFFIDAVIT OF ALLEN T. BIRD.

My name is Allen T. Bird, aged 56 years. Have resided in Nogales, Santa Cruz County, Ariz., during the eleven years last past. I am the editor of The Oasis newspaper published in Nogales, and by profession a mining engineer.

My knowledge of the region included in the Baca float Grant No. 3 was acquired through personal observation made during many and frequent business and professional trips into the region, where I have had mining interests for a number of years, being interested in the Wandering Jew and Joplin group of claims in the Tyndall district in said county, and the Great Excelsior, a property away up in the Santa Rita Mountains some 10 miles north from the Wandering Jew. Have also made examination and reported upon the Apache Chief group of mines, the War-

saw, Royal Blue, Bland, Josephine, Rhode Island, Connecticut, Temporal, Happy Jack, and many other mines in the region.

All geological evidences go to show that the region is one of great and widely distributed mineral wealth. No geologist or practical miner could ever traverse the region in any direction without being impressed by the formation upon all sides as being richly mineral.

Prior to 1863, and at that very time, Tubac was a thriving, bustling town, one of the most important in the Territory, supporting a newspaper. That town was built up on the mineral resources of the Santa Rita Mountains. It was a thriving place from the time of the American occupation until long subsequent to 1863. It was the supply point and headquarters of many mining men then operating in that region. Among those known to have been engaged in mining in this region were Wrightson and Grosvenor, whose names were given Mount Wrightson and Mount Grosvenor, the two loftiest peaks in the Santa Rita Mountains. In a small graveyard near the road leading from Tubac to Salero is the grave of Grosvenor, with a small headstone, the inscription on which recites that he was killed by Apaches April 25, 1863. Prior to that time Mr. Grosvenor had been engaged in mining several years in the region included in the Baca float grant. The graveyard mentioned has about twenty graves, all of people who died or were killed by Apaches and who were engaged in mining in that region at about the same time that Wrightson and Grosvenor were so engaged. The headstone of but one of them has a legible inscription, and that shows that the deceased was killed by Indians in 1861.

In our own properties we have found unmistakable evidences of former occupancy and operations. Upon the "Wandering Jew" mine we stripped the top of the ledge a distance of nearly 300 feet between two shafts we were sinking. Our first work on the trench we dug, about 4 feet in depth, was in virgin ground, and our excavation exposed the mineral in the ledge, which is a high-grade galena, interspersed with gray copper. At the end of about 150 feet we broke into an old working that had been completed much the same as our own, and afterwards covered over. First small saplings and boughs of trees had been laid across the trench, which was on a side hill just below the crest of a ridge. The network of boughs and saplings was covered with a thick layer of closely matted twigs; over these was laid a layer of grass, and upon that a layer of dirt. In a very short time after that covering was made natural causes assimilated its appearance with the adjacent earth, so no one could detect the covered work. We stopped throwing off this old cover-

ing when we reached the dump of our own shaft, and made no effort to carry it beyond the dump. Had we sunk the shaft on the vein we should have penetrated the same old working, but we had sunk between two veins and cross-cut both, our object being to cut each away below the old work uncovered in the trench. That work we believe to have been done by the Jesuit missionaries, the ruins of whose old church in the Santa Cruz valley, at Tumacacori, are visible from the "Wandering Jew" ridge. That mission was abandoned about 1769, at the time of the expulsion of the Jesuits from Mexico. The Tumacacori priests are said to have left records to show that they operated mines in the Santa Rita mountains and shipped the bullion.

Colonel Poston, in his work on Arizona, quotes the Jesuit records, wherein is given a description of the location of their property. It states that standing in the church and looking through the east door toward the mountains, about 10 miles distant is seen a sharp picacho or pinnacle, and that near that are the mines worked by the priests. Standing in the old ruined church to-day and looking through the east door, there is discovered the pinnacle described in the record, and it is the highest point on the ridge through which runs the "Wandering Jew" ledge. The work we uncovered we believe to be a part of that done by the Jesuits. And somewhere in that hill are doubtless deeper and more extensive workings, cotemporary, and covered in the same way.

Upon the Great Excelsior are found already completed a tunnel more than 200 feet in length, by whom done and when no one has ever known. The old-time workers, whoever they were, first leveled off a bench about 30 feet wide in the side hill, from which they started their tunnel. The first 55 feet are through solid syenite, and then the ore body is penetrated and the tunnel cut into that about 480 feet, in ore all the way, with ore still in the face. About 16 feet before the end is reached there is a drift 18 feet wide to the right, and about 100 feet nearer the tunnel entrance are two other drifts, one 27 feet to the left, the other 16 feet to the left. These three drifts are all in ore. The ore is a granular iron pyrites that carries a little gold, not exceeding $2 or $3 per ton. In that tunnel we found an old wooden wheelbarrow. There wasn't a nail or a bit of iron in it. The wheel was a slice out of the trunk of a tree, and all of its joints were fastened with rawhide thongs. Upon the shelf outside a bulkhead had been built from tree trunks, and the ore taken out of the workings piled up against it—more than 200 tons. The tunnel itself is small but as straight as an arrow, and the floor and arch are as smoothly cut and dressed as if the work had been done by a stone-cutter for a building. When or by whom that

work was done, even tradition is silent. In the old Tumacacori mine, sold by one of my partners, Mark Lully, with the Apache Chief group, there is an old shaft, which tradition credits to the Jesuits. Many other claims in the vicinity have similar antigua workings.

EXHIBIT NO. 10.—AFFIDAVIT OF J. N. CURTIS.

I am a manager of mines. My age is 56 years, and have been connected with mines as manager for twenty-five years. I am at present general manager of the Alto Copper Company, and of the Mowry Mines Company, both companies are located in Santa Cruz County, Ariz. Previous to my present position I was general manager of the Silver Bell Copper Company of Pima County, Ariz., and other well-known mines in Arizona. I have made a special study of mineral veins and have traveled over the southern part of Arizona very extensively examining the different mining districts very thoroughly. I am considered an expert judge of mineral veins and deposits. I have located and developed several mines, and put them on a producing and paying basis. I have been able to get capital interested with me in my developing of such mines without any trouble, my name, as a mining expert and engineer, being of sufficient guarantee to capital to furnish the necessary funds for this work, and I have always succeeded in putting the property on a producing and paying basis.

I visited the Tyndall mining district in 1899 and found it to be of large area, very plainly and strongly marked with large mineral veins, with very distinct croppings of ore, of great length and width. In coming into this mining district from Patagonia, the road passes through the Montezuma vein. This dike or vein is over 50 feet in width; its croppings are very bold and can be traced for a long distance; so plain and strong is the Montezuma vein that travelers who are not miners speak of it as a wonderful showing of a mineral vein. The Montezuma is a true-fissure vein in the granite. Proceeding on from the Montezuma vein toward the Salero Hill, other mineral veins are encountered with bold outcroppings, namely, the Darwin (Darum) and others, some of them showing very old workings, which were undoubtedly done by the ancients. Proceeding farther into the district toward and to the Alto Hill, formerly known as "El Plomo," the mineral veins become more frequent, are parallel, and often only 200 to 300 feet apart, with very plain outcroppings, which can be traced for over 2 miles in length, namely, the "Jefferson," with a width of ore on the surface of over 20 feet; the "Buena Vista," with a width of ore of over 40 feet; the "Alto;" and many other parallel ledges, all

so plainly marked as mineral veins on the surface that they can be easily traced for miles, making the mineral character so very plain and evident to anyone going over this part of the Santa Rita Mountains.

The surface ores are generally a lead-silver ore, and in depth passing into a copper-silver or gold ore. They are distinctly a smelting ore.

The geology of this section of the Santa Rita Mountains, namely, the Alto Hill, the Jefferson Hill, and the Salero Hill, is as follows: The country rock of this entire section is essentially granite of two distinct types—the lower that of the dark variety, known as the Laurentian, while overlaying is a light-colored and extremely decomposable type of more recent age. Interstratified between the light-colored schists of the granite or Archean age, great sheets of molten lava have been intruded and by lifting up the overlying schists, as noticed on Alto Hill particularly, have formed high, domelike masses of Lacolithic structures, which to-day we classify as that particular type of Plutonic lava known as gabbro. Subsequent corrugation of the earth's crust, the result of contraction, bowed up the granite and formed the sharp, pronounced anticlines known as Alto Hill, Jefferson Hill, etc. Through the center or apex of the hill a series of parallel fractures or fissures were created by this movement, and the fractures or fissures are represented by the Alto vein, the Buena Vista vein, and the other parallel veins of this hill, with an approximate strike in their longitudinal course of N. 60° E. to N. 80° E.

In conjunction with my findings herewith and the several preceding affidavits, I deem it of the utmost importance to refer briefly to the early authenticated history of the present portion of Arizona purchased from Mexico by the treaty of 1853, and known as the "Gadsden purchase," from which history it is evident that the mineral character of this country was well known as far back as the year 1840. To my mind the only reason why this great stored wealth was not extracted and worked on a larger scale prior to the year 1863 was due to the murderous Apache Indians, who raided this locality from time to time, murdering the prospectors and inhabitants, capturing their stock, and burning any improvements they might have erected. The Hand Book of Arizona; its Resources, History, Towns, Mines, Ruins, and Scenery, by Richard J. Hinton (entered in the office of the Librarian of Congress, Washington, D. C., in the year 1877), deserves numerous quotations here, but for the sake of brevity this history will not be referred to at length. The writer

in his narrative shows that he was thoroughly conversant with the entire region embraced in the Gadsden purchase, and particularly conversant with the mineral regions thereof. His work contains a description of the valley of the Santa Cruz, in the vicinity of Tubac, and of the Santa Rita Mountains and their conspicuous peaks, namely, Mounts Wrightson and Grosvenor, named in honor of two bold pioneers and prospectors. The latter in 1861 was slain near the old hacienda at Santa Rita, presumably by the same band of Apache Indians who murdered Mr. Wrightson, the manager of the Salero Company, shortly before. (Messrs. Wrightson and Grosvenor are referred to in the several affidavits herewith.) He speaks of Professor Pumpelly, whom I will refer to hereafter, then an engineer developing mines in the Santa Rita Mountains and adjacent thereto, the ruins and shafts of which are plainly seen throughout the Santa Rita Mountains. The author refers to the Tumacacori Mission, but states that all that remains of its history is merely tales handed down from generation to generation; but in this he is mistaken, for the buildings are still intact, although in a bad state of preservation. He speaks of the Salero mines and other mines of the Tyndall mining district.

On page 195 the author quotes from an old Spanish work entitled "Apostolic Labors of the Society of Jesus," which is published by one of the most illustrious members of that order, as follows:

> In the year 1769 a region of virgin silver in the Santa Rita range of mountains, Arizona, was discovered on the frontier of the Apaches, a tribe exceedingly valiant and warlike, at a place called Arizona, on a range of mountains which had been named by its discoverers "Santa Rita."

He further speaks in his work of an expedition of over 200 men that was fitted up by the Domisio Robles in the year 1817, which proceeded to the Santa Rita Mountains to discover the valuable minerals reported to be located therein, and says:

> The members of the Robles expedition unanimously agreed that the entire region was wondrously rich in minerals, and that to the east of the scene of their explorations the range was filled with veins of gold and silver, crossing each other in all directions.

With reference to later expeditions the author speaks as follows:

A talented group of men, many of them widely known in public events of the past two decades, have been connected with the Santa Cruz Valley and the mineral explorations of the Santa Rita, Apascoso, Cerro Colorado, and Patagonia Sierras. From 1858 to 1861 the town of Tubac was headquarters for the Salero Mining Company, and also for the Cerro Colorado and other organizations. The first named was a Cincinnati company, formed to work the Salero and other mines to the east of the Tumacacori Mission. Mr. Wrightson, formerly of the Cincinnati Inquirer, was its organizer and early manager. H. C. Grosvenor, an English engineer, was also superintendent. Gilbert Hopkins, a well-known mineralogist and engineer, and Prof. Raphael Pumpelly, geologist, engineer, and author, now professor at Harvard, were the earliest American explorers and workers connected with this company. Col. C. D. Poston * * * and General Heintzelman, * * * mining engineers of repute, were among the daring men who sought for treasure here. The records and reports left by these daring explorers are an evidence of the vast wealth barely attacked in the Santa Ritas, though different Aztec, Jesuit priests, and Spanish explorers have worked in them for centuries past. The importance of this region can be seen when it is stated that seventy-five years ago the Spanish record shows that there were 150 silver mines in operation within a circuit of 15 miles of the presidio of Tubac.

With reference to the work, "Across America and Asia: Notes of a Five Years' Journey Around the World," spoken of by Mr. Hinton, and written by Prof. Raphael Pumpelly, published by Leypoldt & Holt, of New York, in 1870, the same contains an account of the early mining in the Santa Rita Mountains. The author states that his trip through Arizona was commenced in the year 1860. He gives a description of his journey from Tucson (which is now one of the most prosperous small cities of the Southwest) southward up the Santa Cruz Valley to Tubac and the Santa Rita Mountains. He describes the hacienda of Santa Rita and of the valley speaks as follows:

This valley of the Santa Rita, it has been said, has twice during the past two centuries been the scene of mining industry, and old openings on some of the veins, as well as renewed furnaces and arastras, exist as evidence of the fact; but the fierce Apaches have long since depopulated the country, and

with the destruction of the vast Jesuit power all attempt at regular mining has ceased. The object of the Santa Rita Company was to reopen the old mines or work new veins and extract the immense quantities of silver with which they are credited by Mexican tradition.

With reference to his work in and about these mines in the vicinity of Salero the author states:

At last the result of six weeks' smelting laid before us in a pile of planchas containing silver, and there only remains the separating of these materials to be gone through with. During this process, which I was obliged to conduct myself, and which lasted some fifty or sixty hours, I scarcely closed my eyes, and the three other Americans, revolvers in hand, kept an unceasing guard over the Mexicans, whose manner showed plainly their thoughts. Before the silver was cold we loaded it, with the remaining property of the company, even to the wooden machine for working the blast, in the return wagon and were on the way to Tubac, which we reached the same day, the 15th of June. * * * Thus ended my experience of eight months of mining operations in an Apache stronghold.

Another history, to which I will make brief reference, is one published by J. Ross Brown, entitled "The Apache Country; a Tour through Arizona and Sonora." This book was published by Harper & Bros., of New York, in 1869; it contains on page 19 a photograph of the silver mines of the Santa Rita Mountains, and with reference to them the author states:

In August, 1856, an exploring party outfitted at San Antonio, Tex., and after a perilous journey through the Apache Pass arrived at Tubac and proceeded, under the direction of Mr. Poston, to examine the silver mines reported to exist in the Santa Rita, Cerro Colorado, and Aravaca mountains, and in 1857 companies were formed for their purchase and development.

The author speaks of the Santa Rita district, and includes in his work a picture of the hacienda of Santa Rita, and states:

Early in the afternoon we reached the beautiful hacienda of the Santa Rita Company, now solitary and desolate. The houses have gone to ruin and only a few adobe walls, furnaces, and the framework of the mill remain to mark the spot formerly so full of life and enterprise. It was sad to stand amongst these ruins and think how hard a fate had been the reward of nearly all of the enterprising men who had built

up this little community. A few years ago these houses, now empty and crumbling down into dusty fragments, were replete with busy life. The reduction works were in full blast, and every heart throbbed with the brightest anticipation of the future.

Referring to the Salero Mountain, which he states is in a pleasant little valley, stands the ruins of the peon houses once occupied by the operatives of the Salero mine, which mine he states is the principal one in this region, situated in the side of the conical mountain of the same name, rising immediately from this little valley and presenting some very striking mineral phenomena. The shaft is seen about a third of the way up its face, is approached by a wagon road which cuts and leaves exposed a number of veins running into the mountain in nearly the same direction, and all bearing more or less indications of silver. This mine has long been known to the Mexicans, and was worked more than a century ago under the directions of the Jesuits of Tumacacori.

Again on page 231 the author says that on the following day he visited at least 15 or 20 distinct mines, all partially opened and well tested, forming what might be termed a perfect network of silver-bearing leads. Among these were the Salero, Bustello, Crystal, Encarnacion, Cazador, and Fuller, each one of which has yielded, under a very imperfect system of working, from $4 to $1,400 to the ton. The author states that these assays and experiments were made by such men as Pumpelly, Blake, and others. The Blake referred to is Prof. William P. Blake, whose affidavit is herewith transmitted.

Mr. Brown published a book entitled "Report of J. Ross Brown on the Mineral Resources of the States and Territories West of the Rocky Mountains;" this book was published in 1868 by the Government Printing Office at Washington, D. C., and I understand that the investigations were made under instructions from Congress.

With reference to the Santa Rita mines he says these mines are located in the Santa Rita Mountains, some 10 miles east of Tubac, and 50 miles south of Tucson. Mr. Wrightson, the agent of the company, owning most of them, thus refers to their characteristics in a report made in 1859. Then follows the report of Wrightson, which covers the time

he was operating in this locality for the extraction of the precious metals supposed to be contained therein.

I quote the following extracts from "Arizona as it is, or The Coming Country," by Hiram C. Hodge, compiled from notes of his travels during the years 1874, 1875, 1876, published by Hind & Haughter of New York City, in 1877, page 128:

Another rich mineral range of mountains is the Santa Ritas, west of the Patagonia Range, and divided from them by the rich and beautiful Sonoita Valley. The Santa Ritas are 20 miles long north and south, with a width of 3 to 6 miles, and they seem to be filled with lodes of gold, silver, and lead to their whole extent. The district embraced in the old Santa Rita mining district is in the southern declivity of the mountains, 12 miles east from the old Tumacacori mission church, and 65 miles south from Tucson. Some of the mines in this district give evidence of having been worked a century or more since, and from tradition now current much silver was mined here by the old Jesuit Fathers, who employed large numbers of Mexicans and Indians in the work. From 1856 to 1860 the mines here were worked by an eastern company; but owing to the continued and determined hostility of the Indians, who killed many of the employees, Superintendent Wrightson and others discontinued their work.

I also quote the following from Senate reports of "Explorations and Surveys (36th Cong., 2d sess.) to Ascertain the Most Practicable and Economical Route for a Railroad from the Mississippi Ocean, Made under the Direction of the Secretary of War, in 1853–1856, according to Acts of Congress, Vol. IX." * * * Translation of an archive from Tucson concerning water places, lands for cornfields, pastures for horses and cattle, and minerals, etc., in the locality of Tubac, submitted by Manuel Barragua, to and on the request of Señor Capitane Don Pedro Allande y Savedra: he affirms that—

the town of Tubac is situated between two mountains, which are distant from each other 6 leagues.

In the valley there is much lands fertile and suitable for cornfields. There is sufficient water for wheat growing, but scarcely enough each year for corn. * * *

There is much pasture, with an abundance of sustenance for horses and cattle, as well as on the hills and in the dales as on the mountainless plains. * * *

There are many mines of very rich metals to the west. * * *

In the Santa Rita Mountains and its environs, which is distant from Tubac about 4 leagues, there have been examined five silver mines. Two have been tried with fire and three with quicksilver, with tolerable yield. All of this is notorious among the entire population, and they do not work them because there are Apaches in all these places; because they live and have their pastures there, and pass continually by this mountain itself to a place a little more than 4 leagues off, called the Hot Springs (Agua Caliento). Daily experiencing more violence from the enemy, because he is aware of the few troops that we possess, we have desired to break up our homes and sell our effects, and you being aware of it, we received the order which you were pleased to send us, imposing heavy penalties upon us if we should remove; * * * and now, finally, the last month, the Apaches finished with the entire herd of horses and cattle, which we had guarded; and at the same time with boldness destroyed the field and carried away as much corn as they were able. Since the fort was removed to Tucson these towns and missions have experienced some casualties, so much so that they have been obliged to burn the town of Calabasas, a calamity it had never before experienced. Also, but a few days ago, the cavalcade which the Apaches brought from the West was grazing for three days in the vicinity, falling every day upon the fields to load with corn, and to run away with those whom they found there; and lastly, their not leaving the neighborhood, we momentarily expected that they may serve us and our families as they have served our property, there being nothing else left for them to do. * * *

Lastly, I will conclude the several quotations with one from a speech made by the Hon. John R. Watts, Delegate to Congress at that time from the Territory of New Mexico, made before the second session of the Thirty-seventh Congress, 1861–62, contained in the Congressional Globe. This same Watts is the gentleman who located the Baca float No. 3.

Mr. WATTS. Mr. Speaker, it is the general impression that this distant Territory (Arizona) is a God-forsaken portion of the world, of no interest to anybody, and that nobody need take any interest in. Now, I wish to satisfy the House that this is a mistake; that although every acre of ground that is within the limits of Arizona will not produce 75 or 80 bushels of corn, it will produce $75 or $80 or $100 worth of

the precious metals, including gold, and I think the experience of the world is beginning to show that cotton is not king, or if it is, that gold is not only king, but king of kings; * * * I hold in my hand a specimen of the productions of the Territory of Arizona. I can send it to the mint at Philadelphia, and when examined and assayed, it will produce in the article of silver alone $5,000 to the ton. That is a choice specimen. I hold in my hand an assay from the mint at Philadelphia, of an ordinary specimen from the same vein. I ask the Clerk to read it.

The Clerk reads a letter inclosing a report from the Director of the Mint at Philadelphia, of date May 2, 1862, of the assay of some silver ore from the Heintzelman mine in Arizona, left for assay, and amongst other things the report states that ore of the quality submitted would yield $1,660 to the ton. The Heintzelman mine is the Cerro Colorado mine, of which in the preceding extracts you will note several references.

At the conclusion of the reading of the report by the clerk, Mr. Watts continues as follows:

From my intimate knowledge of that section of the country, the Territory of Arizona alone will furnish to the circulating medium of the country $50,000,000 per annum in the articles that I have exhibited to you. * * * All this vast region of country I am now speaking about is lying idle and unproductive. It furnishes no capital to the country, for the reason that it is roamed over by the savage Indians, who come down upon the settlements and spread desolation and destruction.

An Italian sunset never threw its gentle rays over more lovely valleys or heaven-kissing hills—valleys harmonious with the music of a thousand sparkling rills, mountains shining with untold millions of mineral wealth, wooing the hand of capital and labor to possess and use it. The virgin rays of the morning sun first kiss the brow of its lofty mountains, and the parting beams of the setting sun linger fondly around their sublime summits, unwilling to leave to darkness and to night such beauty and such grandeur. If there be a single thought which lights up the ofttimes gloomy pathway of the faithful legislator, it is the sweet reflection that he has been instrumental in protecting the rights of a distant, feeble, and oppressed people against the merciless barbarities of a powerful and treacherous savage foe. Let it not be said of us, that while we are ready to spend untold millions of money and thousands of lives to protect our own lives and property, the appeal of this distant people falls upon our bosoms "Cold as moonbeams on the barren heath."

Mr. Watts's speech in his description of the Territory was none too flowery. He well knew the richness of the country, and especially that included in the present Baca float No. 3; he was acquainted with its valleys, with its mountains and plains, with its agricultural lands. He was no doubt intimately conversant with its mineral-bearing veins, which traverse the float its entire width, when he spoke of the Heintzelman mine, although it it not embraced within this selection, it is still on the same mineral-bearing lead, 10 to 15 miles southwesterly from Tubac. He knew Poston—the same Poston spoken of here and in the several depositions. He was not ignorant of the fact that the men who were extracting valuable minerals from this locality were doing so at the sacrifice of their lives. He does not speak of the Salero and the contiguous property, but in his selection, the northeast portion of the grant, the mineral belt surrounding Salero Hill was the country that must, at any sacrifice, be included in the selection and saved to the Baca heirs. Why did they select the base of the Salero Mountain as the initial point of survey, when many other conspicuous places or objects, natural or otherwise, were available—Tubac, the Tumacacori Mission, or a peak of the San Cayetano Mountains, for instance? No; this risk must not be taken, for accidentally he might omit from his selection the vast riches of the Salero district. He would therefore make Salero Hill the initial point. Their second selection, farther north and east, eliminated almost all the ground included in the first selection, but the country surrounding Salero Hill was not lost sight of, and the second selection embraced the whole southwesterly portion thereof. The "selector" had not lost sight of the future and the riches it might have in store for him. He remembered the tales of the phenomenal wealth of this country. Perhaps his speech made before the Thirty-seventh Congress was still fresh in his memory; he knew that federal aid had been promised and would soon be at hand; troops would invade the country and drive therefrom the bloodthirsty and renegade Apaches. Then, with the Salero country in his possession, and the Apaches forever subdued, he and his followers would return to reap their reward by extracting the valuable ore from these mines.

From the foregoing depositions and those of William P. Blake (Exhibit No. 1) and George Clark (Exhibit No. 11)

and the several extracts, and I have every reason to honestly and candidly believe that they are true, together with investigations made by me in person during the progress of the survey, my recommendations in the premises as to the two questions to be investigated and determined by me—first, as to the known character of the lands at the date of selection or location, June 17, 1863, and second, as to whether the said lands were vacant and unoccupied (eliminating those lands embraced within the unconfirmed portion of the San Jose de Sonoita and unconfirmed Tumacacori and Calabasas claims, as lands embraced therein were in a state of reservation)—are as follows:

1. (*a*) The lands within the Baca float No. 3, which Deputy Contzen was instructed to segregate therefrom by special instructions dated June 17, 1905, were notoriously mineral in character at the date of the selection, and are not subject to the Baca grant.

(*b*) The balance of the lands embraced in said selection, excluding lands embraced in other grants, is generally mineral in character; was so known in June, 1863, and prior thereto. Sufficient evidences are to hand and herewith transmitted, independent of my own observations, to conclusively bear out this statement.

2. The lands embraced in this selection that were not known to be mineral were occupied and not vacant at the time of the selection, and are therefore not subject to the grant.

Therefore, after mature deliberation, it is recommended that this selection be rejected in its entirety as not being subject to the provisions of the act of June 21, 1860, *supra*. In addition to the depositions I inclose a small map (Exhibit No. 15) showing the survey of the Baca float and the mineral segregated strip, and a map (Exhibit No. 18) showing the Santa Rita Mountains with respect to the Baca float, and a map of that portion of Arizona (Exhibit No. 17) showing the Gadsden purchase, with the position of its silver mines as marked in 1859, and a book of photographs.

Respectfully submitted.

FRANK S. INGALLS,
United States Surveyor-General.

The COMMISSIONER OF THE GENERAL LAND OFFICE,
Washington, D. C.

EXHIBIT C.

DECISION OF THE DEPARTMENT OF THE INTERIOR OF JUNE 2, 1908, IN CASE OF BACA FLOAT NO. 3—PRIVATE CLAIM—PASSAGE OF TITLE—EXCLUDED LANDS—BACA FLOAT NO. 3.

The final act by which title passes under the grant made by section 6 of the act of June 21, 1860, is the acceptance by the department, and the filing of approved plat and field notes, of a survey whereby the surveyor-general made location of the selection of lands affirmatively shown to have been vacant and nonmineral at the date of selection, so far as was then known by the selectors.

Lands which at the date of the selection of Baca float No. 3 were embraced within the Tumacacori, Calabazas, and San Jose de Sonoita claims were not "vacant land" within the meaning of section 6 of the act of June 21, 1860, and were therefore not subject to such selection.

FIRST ASSISTANT SECRETARY PIERCE TO THE COMMISSIONER OF THE GENERAL LAND OFFICE, JUNE 2, 1908. (G. W. W.) (C. E. W.)

This is an appeal from your office decision of May 13, 1907, affirming the report and recommendation of the surveyor-general of Arizona, dated November 5, 1906, in the above-entitled case, involving title to nearly 100,000 acres of land situated in the Gadsden purchase, and being a third of a series of five locations, in square form, each containing 99,289.39 acres, of land in lieu of certain claims to a tract also claimed by the town of Las Vegas, authorized to the heirs of Luis Maria Cabeza de Baca by the sixth section of the act of June 21, 1860. (12 Stat., 71.)

Said section is as follows:

That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said [same] tract of land as is claimed by the town of Las Begas [Vegas], to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: *Provided, however*, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

Four of these tracts have been selected and surveyed, and are not in dispute: Nos. 1 and 2 being located in what is now New Mexico; No. 4 in what is now Colorado; and No. 5 within the confines of Arizona.

The situs of float No. 3 was selected by the heirs of Baca on June 17, 1863, but no survey thereof was made until 1905, when the surveyor-general reported, among other things, that the lands within the grant were notoriously mineral in character on June 17, 1863; that the Tumacacori, Calabazas, and San Jose de Sonoita grants, as well as the town site of Tubac, fell partly within the exterior lines of the selected tract; and that the land was neither shown to have been nonmineral nor vacant at the time of selection. Hence he recommended that the selection be rejected in its entirety. Whereupon you directed said officer to allow the claimants sixty days after notice within which to apply for a hearing and to present evidence rebutting the findings of the surveyor-general; in default whereof, or of an appeal from said order, the entire selection would be finally rejected.

It is from this order that the present appeal lies. It is contended:

1. The department is without jurisdiction in the premises;

2. That its construction of section 8, act of July 22, 1854, in Baca float No. 3 (30 L. D., 97 and 497), is erroneous;

3. That its present construction of section 6, act of June 21, 1860, is erroneous; and

4. That the commissioner erred in not approving the survey of said location as the survey of the grant to the Baca heirs made by Congress on said June 21, 1860.

In one form or another this case has been before the department a number of times. Six reported decisions present various aspects of this remarkable litigation: 5 L. D., 705; 12 L. D., 676; 13 L. D., 624; 29 L. D., 44; 30 L. D., 97 and 497. Commenced not so many years after the establishment of this department, it has grown in importance and in intricacy until now, aside from title to a tract of land more than twice the area of this District of Columbia, vast mineral wealth and the rights of a multitude of settlers, adversely claiming, are involved, dependent upon the final decision of this controversy.

The effectiveness of appellants' contention depends upon whether or not the department has exhausted its jurisdiction *in rem;* whether or not the rights of the locators have vested and the legal title to the land covered by this float has passed out of the United States. If it is true that at some stage in the proceedings, the initial act of which was the selection of June 17, 1863, the complete *requirements* of the granting act were met, then the department has not the power to issue the order from which the appeal lies.

Three propositions are advanced by appellants:

1. That the grant made by the act of June 21, 1860, was completely effectuated when the selection was made and notified to the surveyor-general; or

2. That, if the above be not the last act required, the approval of the surveyor-general vested the legal title in the claimants; or, finally, if more is required by the implied terms of the act,

3. That the action of the Commissioner of the General Land Office, on April 9, 1864, was an adjudication of title in the grantees.

The action of April 9, 1864, was an order issued to the surveyor-general by your office, directing the survey of the tract—later to be discussed in this decision.

The fourth and last possible act would be the survey, the certification of the plat, and the filing of the same in the General Land Office. Whether this is an act required in the investiture of title is the crux of the present controversy. If title does not pass until there is a survey, a plat certified, returned, and approved, then the Secretary still has jurisdiction to enquire into all matters involved in the passing of title, including the known character of the land at the time of its selection.

There can be little merit in appellants' contention that title passed at the conclusion of the first or second steps, *i. e.*, upon selection by the claimants or upon the approval of that selection by the surveyor-general. For if that be true, then these grantees have no claim and never have had a lawful claim to the land selected on June 17, 1863, because the selection on that date was not the first attempt to locate float No. 3. It appears from the record that on October 31, 1862, John S. Watts, in behalf of the Baca heirs, filed the third of

the series of selections, on land on the River Pecos, a place known as Bosque Redondo, situated in New Mexico. The surveyor-general certified that the tract was vacant and nonmineral and approved the selection. Further evidence of its vacant and nonmineral character was afforded by the certificate of the register and receiver. The Commissioner of the General Land Office was duly notified of the selection. But before any action was taken by the commissioner, or order for its survey issued, the agent of the heirs, with permission from your office, withdrew the selection. Permission was thus given because the application had not "ripened into a specific location." Now, if the "last act" required by the terms of the grant, expressed or implied, was the approval of selection, by the surveyor-general, it is quite clear that the only location of float No. 3 to which the heirs or assigns of the grantees now have any legal claim, is that of October 31, 1862—the Bosque Redondo land; that is, their rights were exhausted prior to the selection of June 17, 1863, and the selection of that date was consequently ineffective for any purpose.

It is quite clear that something more was required to invest title. The terms of the act itself confer a right in the heirs "to select vacant land, not mineral," to be located by them in square bodies, within three years from the passage of the act. The act furthermore lays a duty on the surveyor-general "to make survey and location of the lands so selected by said heirs of Baca." No limitation in time was imposed for the performance of this duty.

It is plain that the statute can not be confined to its express terms. As in other cases, Congress did not descend into the *minutiæ* of detail. The officer charged with the execution of the legislative mandate, perforce by regulations properly derivative and within the scope of the act, was bound to supply the administrative details. The grantees were not empowered to take any land with merely the limitation of area. The land, so the expressed terms of the act required, was to be vacant and nonmineral. Somewhere there was, by necessary implication, a power to decide whether the land so selected was vacant and nonmineral; somehow, and this again by implication rather than expression, the character of the land was to be determined. It

was the duty of the surveyor-general, "in the first instance, at least" (*Shaw* v. *Kellogg*, 170 U. S., 312), to say whether the land thus selected was within the terms of the grant.

Thus we find that on July 26, 1860, your office issued instructions to the surveyor-general of New Mexico, calling attention to the act in favor of the Baca heirs and directing:

> Should they select in square bodies according to the existing line of surveys, the matter may be properly disposed of by their application duly endorsed and signed with your certificate designating the parts selected by legal division or subdivision, and so selected as to form five separate bodies in square form. Then the certificate thus endorsed is to be noted on the records of the register and receiver of Santa Fe and sent on here by these officers for approval. Should the Baca claimants select outside of the existing surveys, they must give such distinct descriptions and connection with natural objects in their applications to be filed in your office as will enable the deputy surveyor, when he may reach the vicinity of such selections in the regular progress of surveys, to have the selections adjusted as near as may be to the lines of the public surveys which may hereafter be established in the region of those selections.
>
> In either case the final conditions of the certificate to this office must be accompanied by a statement from yourself and register and receiver that the land is vacant and not mineral.

This was a necessary and reasonable regulation, in no way restrictive of the terms of the grant and in every way derivative from the act itself, and essential in its execution. As such, it clearly had the force of law.

What is allowed to be done is anything within the law that is in execution of it; what is forbidden to be done is anything without the law that is in extension of it. (Wyman on Administrative Law, sec. 99; *United States* v. *Eaton*, 144 U. S., 677; *In re* Kollock, 165 U. S., 535.)

Whether the location was upon surveyed land or unsurveyed land, the certificate of selection, in either case, after notation on the records of the local land office, was to be sent to the General Land Office for approval, accompanied by a statement from the surveyor-general, the register, and the receiver that the land was vacant and not mineral. The selection was to be *certified* locally and afterwards *approved* in Washington; if unsurveyed, a survey was evidently to follow the approval; if surveyed, it would seem that no further

action was necessary, neither the act nor the regulations so providing.

John S. Watts, attorney for the Baca heirs, filed his selection of the land in controversy June 17, 1863, describing it by courses and distances from an initial point definitely located with reference to a natural object, Salero Mountain. On the same day the surveyor-general certified the selection, concluding his certificate with the sentence: "Said location is hereby approved." Under date of June 18 he forwarded a copy of the application and certificate to your office, stating:

> As this location is far beyond any of the public surveys, I have not deemed it necessary to procure any certificate from the register and receiver of the Land Office, as from the nature of the case they can not officially know anything concerning it.

A month later he was notified that his "approval of the location * * * ignored the imperative condition that the land selected * * * is vacant land and not mineral." Therefore, "before the application * * * can be approved by this office, it is necessary that our instructions of the 26th of July, 1860, should be complied with by furnishing a statement from yourself and register and receiver that the land thus selected * * * is vacant and not mineral."

To this the surveyor-general, then in Washington, replied (April 2, 1864) that there was no evidence in his office that said selected tract "contains any mineral or that it is occupied." As he was personally unacquainted with that region of the country, he could not "certify that the land in question is vacant and not mineral or otherwise." "Those facts," he added, could "only be determined by *actual examination and survey*."

The register and receiver were not so unwilling to certify to the character of the land. On March 25, 1864, the former certified that the lands "from all information in this office are vacant and not mineral." The latter said that they were "vacant and not mineral so far as the records of this office shows (not having been surveyed)." The surveyor-general, however, did not pass upon the character of the land. If he, "in the first instance at least," was bound to decide whether the land was vacant and nonmineral, such a decision is entirely lacking in this case.

Arizona, in the meantime, had been set apart from New Mexico as a separate Territory. On April 9, 1864, the Commissioner of the General Land Office issued the following instructions to the surveyor-general of the new Territory:

By an examination of the papers herewith inclosed relating to the third of the series of the Luis Maria Baca grants * * * you will preceive that the location of the one-fifth part of said grant as set forth by the claimants has been approved by the surveyor-general of New Mexico, under whose jurisdiction the application properly came at the date of the approval.

After speaking of the statute and the duty therein imposed upon the surveyor-general to survey the tract "when required by said heirs," and of the effect of the act of June 2, 1862, requiring surveys to be at the expense of the claimants, the commissioner, "in order to avoid delay," authorized the surveyor-general to contract with a competent deputy whenever the claimants deposited a sum sufficient to cover the expense, "and have the claim numbered 3 of the series surveyed as described in the inclosed application."

Transcripts of the field notes and plats certified in accordance with the requirements of the law will be transmitted to this office and will constitute the muniments of title, the law not requiring the issue of patents on these claims.

Specific instructions as to the erection of proper monuments follow.

In conclusion the commissioner said:

The foregoing statement and the certificate of Surveyor-General Clark having been submitted to this department, and having undergone a careful examination, the location being approved by him to perfect title under the authority of the act approved June 21, 1860, application for survey having been made, instructions (copy herewith attached) have been given to Surveyor-General Levi Bashford, of Arizona, in which Territory the lands located now are, to run the lines indicated and forward complete survey and plat to be placed on file for future reference as required by law.

But the survey was not made for over forty years. A number of causes account for it. Mr. Watts, soon after the order for survey as aforesaid, attempted to amend the application by changing the initial point. Subsequently others, claiming as heirs of Baca, also attempted to relocate the claim, attacking their own title for this purpose by alleging

that it had been discovered that the Salero location (June 17, 1863) covered minerals. An attempt to secure legislation in the early eighties failed. Former decisions in this case detail sufficiently this part of its history, which need not be repeated. It is now recognized and so held that the heirs and their assigns are held to the location of June 17, 1863. One application for relocation, however, does not appear in the printed record of this litigation—that of the son of Mr. Watts, who, in 1877, requested permission to relocate because his father's "location was disapproved by your office on account of its being mineral or for absence of proof that it was not mineral."

To this the commissioner replied:

> Some correspondence has been had by this office relative to the character of the land embraced in said location, whether the same was nonmineral as required by the 6th section of the act of June 21, 1860, but I do not find that said location was disapproved by this office, but on the contrary, instructions were subsequently given, May 21, 1866, for the survey according to the amended application of Mr. Watts of April 30, 1866.

If the action of April 9, 1864, were a finality, and title to the location of June 17, 1863, then and there passed to the locators, what authority existed for the allowance of the modification of the application by changing the initial point of the location? If the "location" by the grantees alone sufficed, the location would have ceased then and there to be a "float;" the "initial point" would have ceased to be movable at the caprice of the grantees, with the indulgence of the General Land Office, and the selection itself would have become more than a mere grographical expression—a known, delimited tract, segregated from the public domain and removed from the jurisdiction of this department.

Bearing upon the general question, the procedure with reference to the other "floats" is pertinent.

On December 8, 1860, Surveyor-General Wilbur certified the selection covered by float No. 1, on land near Valles Grandes, N. Mex., "which I believe is not mineral and which is vacant." He approved the selection. The register and receiver stated that the surveyed portion was "vacant and not mineral according to the plats on file in this office," but a portion being unsurveyed, "consequently we can give no

certificate concerning it." On May 24, 1871, survey was ordered "to be made in accordance with said application for location." Survey was duly made, the certified plats and field notes filed as reqired by the regulation, and accepted, and title to this tract has long since passed to the claimants. But, it will be noted, prior to the survey there were not in the case, as to a portion of the selected tracts, the certificates required by the regulations regarding the character of the land or the vacancy of the same, and hence there could have been no final adjudication there or at Washington, at any time *before the survey*, that the selected tract was, as to its entirety, within the terms of the grant.

Float No. 2 was selected December 15, 1860. The surveyor-general certified that from the best information he could obtain the land was vacant and nonmineral. He approved the selection save as to two sections released by the heirs to the Government. The register and receiver certified, that the surveyed portion was vacant and nonmineral, with certain exceptions (land preempted prior to location), and that from the best obtainable information the unsurveyed portion was also vacant land not mineral. Survey was ordered, the land was surveyed, and the plats certified and filed September 27, 1861. This tract has never since been in dispute. Here was also a complete adjudication on all points.

Float No. 5 was first located near the Fort Sumner Reservation in New Mexico. By act of Congress of June 11, 1864 (13 Stat., 125), the heirs were authorized "to raise and withdraw the selection and location" and "to select and relocate the same, in the manner provided by said act," at any time prior to June 21, 1865, "upon any of the public land, unoccupied and not mineral" within New Mexico. Upon such "selection and relocation," the title "shall be, and is hereby, confirmed to said heirs * * * as fully and perfectly as if the same had been selected and located" prior to June 21, 1863. Section 2 of the act provided that upon such selection and relocation "all right, title, and interest" in the land previously selected near the Fort Sumner Reservation was to be thereby "divested and declared null and void, and the same shall revest in the Government of the United States."

The new selection thus authorized was notified to the surveyor-general May 6, 1865. It included land at Francis Creek, between Fort Mojave and Prescott, which Mr. Watts represented to be "vacant and not mineral." Under date of June 7, 1865, Surveyor-General Clark approved the location, and wrote as follows to your office:

The tract of land described in the application is far beyond any of the public surveys and I know personally nothing whatever about it, nor have I any information concerning it except the statement in the application of Judge Watts, a copy of which is inclosed. There is no evidence in this office that the tract located as above is mineral or that it is occupied nor any record relating to it of any character whatever.

The commissioner notified him, August 14, 1865, that no survey could be authorized until evidence was obtained by him showing the land to be nonmineral and unoccupied. To this, September 14, 1865, the surveyor-general replied as follows:

On the 17th of June, 1863, Judge Watts, as attorney for the heirs of Baca, located one-fifth of the claim confirmed to them, at the Salero Mountain in Arizona (No. 3). A certified copy of the application to locate, with my approval, was transmitted to your office with my letter of 18th of June, 1863. In reply to your letter of July 18, 1863, requesting a statement from myself and the register and receiver of the land office, that the land located (No. 3) was vacant and not mineral, I stated, in substance (in my letter of April 2, 1864), that there was no evidence in this office that the land in question was occupied or mineral or otherwise, and that I had no personal knowledge concerning it. Upon receipt of that statement, and without any proof concerning the occupancy or character of the land (as I understood at the time), Mr. Bashford, the surveyor-general of Arizona, was instructed to cause the location to be surveyed upon receipt by him of the estimated cost of the survey, etc.

It having been decided by your office that no patents are to be issued in these cases, and you having ordered the survey of location No. 3 as above, I supposed that the rule requiring proof of the character of the land, and as to whether it is occupied or not, had been rescinded, and therefore have not required of the parties (No. 5) any proof whatever.

He then called attention to the following certificate, a copy of which is inclosed:

We hereby certify that we are well acquainted with the land described in the foregoing boundary located in the

name of the heirs of Luis Maria Baca and that the same is unoccupied and not mineral.

New York, 1 May, 1865.

CHARLES D. POSTON.
JOHN MOSS.

These gentlemen were agents of the Baca heirs. On November 10, 1865, the commissioner refused to accept this as sufficient "to enable us to base our official action thereon, and therefore no definite proceeding in reference to the survey of the claim is indicated to you." But on May 23, 1866, the commissioner wrote that the views of his office "respecting the final proceedings on your part in causing the survey to be made of the aforesaid claim are hereby modified and you are authorized to have the claim surveyed."

The authority thus given you for the survey of the fifth location of the claim is accompanied with the proviso that the outboundaries of the grant will embrace vacant land, not mineral, as provided in the sixth section of the act, etc.

Authority was given for the survey, but no adjudication as to the availability of the land for selection was made. On the contrary, the vacant, nonmineral character of the land was expressly left open, apparently to be determined, so far as local officers were concerned, upon survey; for the authority given was subject to the proviso that the "fifth location" should not embrace the occupied or mineral land. In 1877 the selection was surveyed, and in certifying the field notes the statement that the land "is entirely of a nonmineral character" was expressly made. In 1898 a patent was issued—the General Land Office receding from its position that no patent could be issued because the act did not specifically so require. The adjudication of the character of the land could not have been made prior to survey in this case.

It is unnecessary to repeat in detail the proceedings in relation to Baca float No. 4, for the decision in *Shaw* v. *Kellogg* (170 U. S., 312) contains a very full statement of the facts. Briefly: The selection was filed December 12, 1862, in the office of the surveyor-general of New Mexico, who forwarded a copy to Washington and to the surveyor-general of Colorado, within whose district the land was located. The latter, February 24, 1863, wrote the commissioner that he supposed

this location was one made by ex-Governor Gilpin, who told him "last summer" that he would locate one of these "floats," "as this is located for the reason that, in his opinion, it would cover rich minerals in the mountains." This officer was very promptly informed that before "the application can be approved by this office" certificates from him and the register and receiver to the effect that the land was vacant and not mineral must be furnished. Especial care was to be exercised in ascertaining the facts in view of the "important statement of ex-Governor Gilpin." Later, the last-mentioned gentleman applied to the surveyor-general for a survey. The latter made a contract with a deputy surveyor and forwarded the same to your office for approval. On November 2, 1863, the contract was disapproved and the surveyor-general notified that the certificates aforesaid must be furnished. Whereupon (December 12, 1863) he and the local land officers certified "that from good and sufficient evidence" they were "perfectly satisfied that the land * * * located * * * and marked out by a survey made by * * * Sheldon in November, 1863, is not mineral and is vacant." This was not accepted as sufficient (January 16, 1864). But on February 12, 1864, the General Land Office reconsidered the matter. Criticising the surveyor-general for refunding the deposit of Mr. Gilpin (for cost of survey) and allowing him to pay for the Sheldon survey as a "private survey," the commissioner stated that the difficulty might be avoided by pursuing this course: The original field notes, duly verified and authenticated, were to be filed in the surveyor-general's office, and were then to be brought "to the usual satisfactory tests;" if regular and correct, the surveyor-general was "authorized in virtue of the aforesaid sixth section of the said act of 21st of June, 1860, to approve the said survey." He was further instructed to make his approval subject to the condition that the land should be nonmineral and vacant—a condition which the court held was beyond the power of executive officers to impose. The field notes were thus approved by the surveyor-general and forwarded to your office March 29, 1864. No action whatever was taken in relation to the field notes, etc., beyond the bare acknowledgment, May 4, 1864, that they had been "received at this office."

The court held that the title had passed to the grantees. The main thing in controversy in that case was not at what particular point in the proceedings title actually passed, but whether or not when it did pass the Land Department had any authority to impose any condition or limitation. It was therefore not essential to decide exactly at what point the Government lost its title to the land. The court dwells more especially upon the evidence of the fact that at some point in the proceedings title flowed from the Government to the grantees. The filing of the approved field notes of survey was certainly final as an evidential fact; but was it the final act of statutory requirement, short of which there was no divestiture of title? Was it more than the counsel for appellants claim and than the commissioner intimated in his letter to the surveyor-general—that his "plat approved in the manner indicated will therefore constitute the *evidence* of title," or, as he said in relation to Baca float No. 3, the "*muniments*" of title?

Certainly, so far as the express terms of the act are concerned, there was no other way of evincing the passing of title and of definitely delimiting and publishing to the world exactly where and what the granted land was. A fair construction to be placed upon the language of the commissioner is that he was merely reciting a fact and not pronouncing judgment as to the exclusive effect that the return of the certified plat and field notes would produce.

In Baca float No. 4, the survey was made in November, 1863; the certificates concerning the character of the land, etc., in December, 1863; the action of the commissioner in directing the manner of final disposition of the case, in February, 1864; and the final act of the surveyor-general in approving the plat and field notes and in forwarding them to the General Land Office in March, 1864. These dates are of significance in acquiring a correct understanding of what the Supreme Court had in mind in speaking of the duty and action of the surveyor-general:

> How was the character of the land to be determined, and by whom? The surveyor-general of New Mexico was directed to make survey and location of the lands selected. Upon that particular officer was cast the specific duty of seeing that the lands selected were such as the Baca heirs were entitled to select. * * * We do not mean that

Congress thereby created an independent tribunal outside of and apart from the General Land Department of the Government. On the contrary, the act of 1854 provided that he should act under instructions from the Secretary of the Interior, and so undoubtedly in proceeding to make survey and location as required by section 6 of the act of 1860, he was still subject to the control and direction of the Land Department; but while he was not authorized by this section to act in defiance or independently of the Land Department, he was the particular officer charged with the duty of making survey and location, and it was for him to say, *in the first instance at least*, whether the lands so selected, and *by him surveyed and located*, were lands vacant and nonmineral. This is in accord with the views of the Land Department, as appears from the official letter of June 28, 1884, * * * "You will see by the foregoing that the land in question was determined, *in 1864*, by the surveyor-general, whose province and duty it was, to be nonmineral; the location was then perfected and the title passed."

* * * * * * *

It will also be perceived that the surveyor-general, as well as the register and receiver of the land office, each certified that the land was nonmineral. These certificates were their decision to that effect. They were made in accordance with the original instructions sent out by the Land Department in July, 1860, and in this respect they were all that was required by those instructions, which were "in either case that is, whether the selection is either within or without the existing surveys) the final condition of the certificate to this office must be accompanied by a statement from yourself and the register and receiver that the land is vacant and not mineral." Thus the proper officer decided that the land was nonmineral, and accompanied the report of the survey and location with all the certificates and statements required by the original instructions from the Land Department.

The certificates required by the regulations constituted a decision on the part of the local officers, on the strength of which a survey might be ordered. That is, before the Land Department would be justified in taking or authorizing any final steps, a *prima facie* showing as to the character of the land and its availability for selection was required. Apparent contradictions in the course of the decision in *Shaw* v. *Kellogg* are to be explained in the light of the peculiar conditions in that case—a survey preceding any certification by the local officers. There is no escape from this conclusion, however: It was the action of the surveyor-general *in 1864*, and not his

action *of 1863*, that amounted to an adjudication that the land selected was within the terms of the grant. However unsatisfactory his preliminary certification was, the court notes (p. 336) that when he "proceeded to approve the survey, his certificate of approval" was "absolute and unconditional," and the plat and field notes were duly filed.

But one conclusion can be deduced from the proceedings, and that is that the Land Department, perceiving that its original instructions had been strictly complied with; that no money had been appropriated by Congress for actual exploration of the lands; that no way was open for securing further evidence as to their character; that the time within which any other location could be made had passed; that it was the right of the locators to have the question settled and *the title confirmed or rejected*, ordered the closing of the matter, *the passage of the title*, etc.

Still bearing in mind that the court was dealing with a case where there had been a survey and an approval thereof by the party who in the first instance was charged with the adjudication of the questions initiated by the act of selection, the following excerpt from the opinion, rightly understood, is helpful:

Congress had made a grant, authorized a selection within three years, and directed the surveyor-general to make survey *and location*, and within the general powers of the Land Department it was its duty to see that such grant was carried into effect and that a *full title* to the *proper land* was *made*. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time.

What time? Manifestly, in the light of the facts with which the court was dealing, at the time when all that was directed to be done had been done—selection, survey, and location by the surveyor-general. No attempt was made in Baca float No. 4 to attach any string to the grant until a survey had been made; and the qualifying terms, possibly in the future to effect a defeasance of title, were incorporated in the approval of the plat and field notes of the survey. This,

the court held, was beyond the power of the department: it was its duty finally to settle the question *at that time*, the time when the sole remaining thing to be done in passing title was the filing of the approved plat and field notes of survey. "Undoubtedly it could refuse to approve a location on the ground that the land was mineral." What, then, if the plat and field notes showed that fact?

Take the case of Baca float No. 5: Assume that the survey of 1877 had disclosed the fact that the surface of the inclosed area was incrusted with mineral wealth—and counsel in oral argument submitted that would make no difference—would the Land Department be destitute of power to "refuse to approve the location on the ground that the land was mineral" in the face of its letter of May 23, 1866, when in giving directions for the "final proceedings" on the part of the surveyor-general it directed that the "authority thus given" was "accompanied with the proviso that the outboundaries of the grant will embrace vacant land not mineral?" Did this cautious direction render the Land Department *functus officio*, and would any court compel it to receive and deposit as a "muniment of title" the certified plat and field notes showing that the land was not only partly occupied but notoriously mineral at the date of selection, and thus precisely the land which Congress in empowering the grantees to select excluded from selection by them and therefore from location by the surveyor-general?

Adverting to the act of June 21, 1860, in this connection, it is noted that Congress not only made it the duty of the surveyor-general to survey the land "so selected," but to "make * * * location" thereof as well. The expression is significant. In the first part of the act the heirs are authorized to "select" vacant land not mineral "to be *located* by them in square bodies," etc. In the next sentence it is made the duty of the surveyor-general to survey and make "*location*." Why the recurrence in expression of this idea of location? If to the selector's act—his "location"—a perfunctory survey is merely to follow in order to furnish "muniment of title" (and this is appellants' case), the duty to "make * * * location" is a direction to perform a meaningless task: technical location has already been effected. But "located" was used by Congress in another sense—in

its usual colloquial meaning as a pointing out, a designation, of the tracts wanted—selected by the grantees. "Location," as an act of a government officer, in this statute has a different meaning—a technical import, signifying the action by which the selected tract is segregated from the public domain and appropriated to the use of the grantee. In this sense the duty of making location is placed upon the surveyor-general and not upon the beneficiaries of the grant. It would be anomalous were it otherwise. If their act of selection, designating a certain tract and describing it by courses and distances from a known initial point, were sufficient to change the character of the inclosed area from public to private land—the survey later to be made merely for their convenience and to afford a muniment of a title already passed—there would indeed be some foundation for the contention of counsel, i. e., that it would make no difference even if the surface of the inclosed tract were rich with minerals; for legal title then passed and could only revest in the United States upon suit to recover the same on the ground that the location covered land excluded from selection by the terms of the grant. Congress certainly never intended that legal title should pass until there had been a determination by the proper authorities that the land selected was such as the granting act contemplated. Until then there could not be an official "location" effecting, if not disapproved by the superior officers of the surveyor-general, a segregation from the public domain and an investiture of title in the grantees. The act does not state exactly when this determination is to be made. The evidence upon which the Land Department is to adjudicate the question may be presented through certificates and by indorsement on a certified plat and field notes of a survey already made, as in Baca float No. 4, or left for determination, as in Baca float No. 5, at the time of survey and location, the instructions for the making of which containing the proviso that the outboundaries should not include mineral land.

In 1863 or 1864, there had been no determination of the nonmineral character of float No. 3. The surveyor-general refused to certify that the land selected was unoccupied or nonmineral and definitely stated that those questions could only be determined by a survey; whereupon survey was ordered.

Nothing was said, it is true, by your office as to such an investigation. But it is evident none of the parties regarded the order for survey a final and conclusive act, passing title from the Government to the claimants. For, as hereinbefore shown, the latter almost immediately sought permission to amend their application by changing the initial point of the selected tract, and when (and improperly) that was permitted, the letter of instructions for the survey of the amended selection (dated May 21, 1866) contained the same proviso noted in the case of Baca float No. 5, viz, that the outboundaries indicated by the amended application should embrace vacant lands not mineral.

So far were the steps then taken regarded generally as inconclusive by the Land Department and by the claimants that the latter repeatedly sought in divers ways, through legislation and without, to avoid the selection of June 17, 1863, even going to the extent of alleging that the land then selected was mineral and not within the terms of the grant. Yet there was the order of survey upon their deposit of the necessary sum of money to cover the cost thereof—a survey which if the land was properly selected would long since have resulted in a location and passing of title to the claimants. That no survey was made until after forty years had passed is not the fault of the Government.

In striking contrast are the facts in respect to float No. 4 as summed up by the court (p. 342):

> Congress in 1860 made a grant of a certain number of acres, authorized the grantees to select the land within three years anywhere in the Territory of New Mexico, and directed the surveyor-general of that Territory to make survey and location of the land selected, thus casting upon that officer the primary duty of deciding whether the land selected was such as the grantees might select. They selected this tract. Obeying the statute and the instructions issued by the land department, that officer approved the selection and made the survey and location. The land department, at first suspending action, finally directed him to close up the matter, to approve the field notes, survey, and plat, and notified the parties through him that such field notes, survey, and plat, together with the act of Congress, should constitute the evidence of title. All was done as directed. Congress made no provision for a patent and the land department refused to issue one. *All having been done that was prescribed by the statute, the title passed.* The land department has repeatedly

ruled that the action then taken was a finality. It has noted on all maps and its report that this tract had been segregated from the public domain and become private property. It made report of this to Congress, and that body has never questioned the validity of its action. The grantees entered into actual possession and fenced the entire tract. They have paid the taxes levied by the State upon it as private property, amounting to at least $66,000.

During all these years the land selected on June 17, 1863, has been retained on maps and records as a part of the public lands; the grantees have never been in possession and have never paid a cent of taxes upon it as private property, but, on the contrary, until recent years have treated it as a piece of land unwisely selected, but happily not so far appropriated by them in settlement of their claim as to prevent, if the Government would permit, a new selection elsewhere. All has not been done "that was prescribed by the statute," and hence title has not passed.

The department holds that the final act by which title passes under the grant of June 21, 1860, is the acceptance by the department and the filing of approved plat and field notes of a survey whereby the surveyor-general made location of the selection of lands affirmatively shown to have been vacant and nonmineral at the date of application, so far as was then known by the selectors.

It is contended that the department has erred in its construction of section 8 of the act of July 22, 1854, in holding (30 L. D., 97, id., 497) that the portion of the selected tract in controversy covered by the Tumacacori, Calabazas, and San Jose de Sonoita claims, were by operation of said section 8 in a state of reservation at the time of the selection of June 17, 1863, and thus not "vacant land" within the meaning of the act of June 21, 1860, although the claimants did not file their claims with the surveyor-general until after the filing of the application by the Baca heirs. Appellant urges that there could be no "claim" initiated until such was preferred to the surveyor-general and that until such action was taken the land was public land; in other words, that through operation of said section 8 no land became "reserved" and therefore inappropriable while *sub judice*, until there had been a *demand* made therefor upon the proper officer—not, in this case, made until after the Baca claimants had acted.

The position taken by the department (30 L. D., 97 and 497) is that the act of July 22, 1854, did not require any affirmative action on the part of those claiming, under alleged Spanish or Mexican grants, to place the land covered by these claims in reservation; that the statute, silent as to any demand being made on the part of the claimants, of its own vigor reserved such land from any appropriation until the validity of the Spanish or Mexican claims had been adjudicated.

The position thus taken, the department is convinced, is sound. By virtue of the articles of the treaty of Guadalupe Hidalgo alone, no land contained within the claimed limits of any Mexican grant was reserved. (*Lockhart* v. *Johnson*, 181 U. S., 516.) Withdrawals or reservations depended entirely upon legislative action—and the terms or conditions of said reservations necessarily upon the terms of the statute by which they were created. Thus, in respect to certain claims within the territorial limits of California, Congress, on March 3, 1851, provided that all lands the claims to which should not be presented within two years therefrom should "be deemed, held, and considered to be a part of the public domain of the United States." This was notice to all claiming under a Mexican or Spanish grant to assert and maintain their claims within a certain time before a commission for that purpose appointed, else the land claimed would become part of the public domain and consequently subject to other appropriations. A failure thus to assert or present the claim, or to prosecute, terminated the reservation; to perpetuate the reservation until there had been a final adjudication of the claim, the statute creating the reservation imposed a duty on the claimant to make a demand. (*Newhall* v. *Sanger*, 92 U. S., 761.) But in the case at bar, the lands affected by the Tumacacori, Calabazas, and San Jose de Sonoita claims were subject to another statute (act of July 22, 1854), the terms of which, in creating the reservation, did not impose the duty of presenting a demand on the part of the claimants to the surveyor-general. It was the latter's duty "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico." On him, apparently, was placed the initiative. And so from 1854 until the establish-

ment of the Court of Private Land Claims, by act of March 3, 1891 (26 Stat., 854), the tracts embraced by the Tumacacori, Calabazas, and San Jose claims, irrespective of the validity of those claims, were not open for disposition by donation or otherwise as a part of the public domain. (*Lockhart* v. *Johnson*, 181 U. S., 516, 526.) *A fortiori*, they were not subject to selection under an act which expressly excluded land that was occupied, such as the act of June 21, 1860. It follows that such portions of the selection of June 17, 1863, as fall within the claimed area of these grants were, on the date mentioned, excluded from consideration in the passing of title to the location as a whole.

The plat and field notes of the survey of Baca float No. 3 recently made do not contain the approval of the surveyor-general. On the contrary, he refuses his approval on the ground that the area included in the selection of June 17, 1863, was at the date of said selection known to be occupied in part and mineral in character.

The order remanding the case for a hearing before the surveyor-general, if after notice appellants request the same, for the purpose of affording them an opportunity to present evidence in rebuttal of the adverse *prima facie* showing, will not be disturbed. If they default in applying for hearing within sixty days from notice of this order (and it will be the duty of the surveyor-general so to give notice to all parties in interest as required in your decision of May 13, 1907), the return of the said officer will be accepted as correct and the entire selection finally rejected.

In the event of a hearing, the land covered by the Tumacacori, Calabazas, and San Jose de Sonoita claims will, as aforesaid, be excluded from consideration, and whatever may have been the known character (as to minerals and vacancy) in 1863 of said claims will not be given evidential weight, for or against the claimants, in determining the availability of the rest of the float for selection.

If as a result of the hearing the land department is satisfied that the land, excluding the reserved portions thereof, was not known to have been mineral or occupied at the time of selection, the surveyor-general, as in Baca float No. 4, may be ordered to approve the survey and to file the plat and field

notes, to effect the passing of title to the claimants as well as to afford muniment of that title. Or, if the hearing develop as a fact that portions only of said float were not available for selection in 1863, on account of having been then known as mineral in character or as occupied land, such portions may be so segregated by survey as to exclude them from the effect of an approval of the survey of the float as a whole.

Certain other appeals by parties claiming interest in portions of the land embraced by the outboundaries of the float are dismissed, as the issues therein raised are herein determined.

The action below is affirmed.

Exhibit D.

DEPARTMENTAL DECISION OF DECEMBER 5, 1908.

In re Baca Float No. 3.—Motion for review.—Overruled.

The Commissioner of the General Land Office.

Sir: This is a motion for the review of the departmental decision of June 2, 1908, in the above-entitled case. The motion and argument in support thereof attack very generally the propositions on which that case was considered and from which the conclusion, adverse to the claimants, was reached. Any consideration of the specific assignments of error would practically involve a discussion of all that the department said in that decision. The motion essentially invites a restatement, or modification of statement, were it favorably to be entertained, of all the points upon which deliberate judgment was rendered.

This is unnecessary, because, upon careful consideration, the department is convinced that its decision is free from that error which would require a reversal of the action taken.

Emphasis is laid upon the similarity in certain controlling facts between this case and the one in which the Supreme Court reached another conclusion, viz, Baca Float No. 4, *Shaw* v. *Kellogg*. (170 U. S., 312.) It is argued that here, as there, the surveyor-general, on whom was placed the duty to decide "in the first instance" as to the mineral or non-mineral, occupied or unoccupied, character of the land selected, "approved" each selection by the Baca heirs—No. 3 in terms no less decisive than in the case of No. 4.

The record will not sustain this contention. While in the case under consideration the surveyor-general did say: "Said location is hereby approved," coupled therewith is the averment that he knew nothing and could say nothing as to the character of the land. In the case of float No. 4, the surveyor-general's certificate of December 12, 1863, was much more persuasive in its effect, viz, that "from good and

sufficient evidence" he was "perfectly satisfied" that the land in question was not mineral or occupied. *But this was not the decision of the surveyor-general to which the court in Shaw v. Kellogg referred and upon which the decision in that case turned*, so far as it involved the question presented in this case. The certificate of 1863 was not deemed satisfactory by the General Land Office. Once more, in March, 1864, the surveyor-general passed upon the character of the land when he approved and forwarded the field notes, etc., of survey—*when he approved the survey, in short*. So the court, in *Shaw* v. *Kellogg*, said that it was for the surveyor-general to say—

> in the first instance, at least, whether the lands so selected, and *by him surveyed and located*, were lands vacant and nonmineral. This is in accord with the views of the land department, as appears from the official letter of June 28, 1884, * * * "You will see by the foregoing that the land in question *was determined, in 1864* (not 1863) by the surveyor-general, whose province and duty it was, to be nonmineral; *the location was then (1864, not 1863) perfected and the title was passed*."

In all, save float No. 3, there is present the performance of every act contemplated by the act of June 21, 1860: Selection and survey and certification by the surveyor-general. In float No. 1, his certificate was not in terms the most positive: "I believe," he said, "that the land is not mineral and is vacant." Upon survey, nothing appeared to disturb this belief, and he approved the plats and field notes. The same is true of float No. 2: The surveyor-general certified prior to survey that the land was vacant and nonmineral, from the best information he could obtain; and in 1861, when survey was made, he could certify the plats and field notes without qualification. In float No. 4, as above mentioned, his first certificate (1863) was not satisfactory; but that of 1864 quite met all requirements—in fact, exceeded them, according to the holding of the court, viz, that the certification must be unequivocable and not contingent upon the future discovery of metal; and that, after all, is the only point which the court definitely decided in *Shaw* v. *Kellogg*. In float No. 5, the final return of plat of survey and of field notes contained the required certification as to the nonmineral

character of the land. Whatever was lacking in the incidents of passing of title in that case, from the department's point of view, may not now be called in question, as patent to that selection was issued in 1898.

But in float No. 3, there is no certification on the part of any surveyor-general that the land was, at the date of selection, an unoccupied tract of the character which the Baca heirs were authorized to select. There has been no survey or definite location or segregation by a surveyor-general until recently, and that surveyor-general is unwilling, on the present record, to certify to the nonmineral character of the land selected.

Therein this case differs so materially from those involving the other floats that it is useless to attempt to build a claim to favorable action by analogy. If the contention of appellants be correct, the department has not denied them anything to their irreparable injury. It is urged that they need a "muniment" of title. If they have title, as they maintain, the failure of direct muniment, they need not be reminded, will not preclude them from securing that remedy against adverse claimants or trespassers which it is the province of courts to afford.

The motion is overruled.

Very respectfully,

(Signed) FRANK PIERCE,
First Assistant Secretary.

O

171 *Replication.*

Filed August 22, 1910.

* * * * * * *

These replicants, saving and reserving to themselves all and all manner of advantage and exceptions which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendants, for replication thereto say: That they do and will ever maintain and prove their said bill to be true, certain and sufficient in the law to be answered unto by said defendants, and that the answer of said defendants is very uncertain, evasive and insufficient in the law to be replied unto by these replicants; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, avoided, traversed, or denied, is true; all which matters and things these replicants are ready to maintain and prove as this honorable court shall direct, and humbly as in and by their said bill they have already prayed.

HARTWELL P. HEATH,
CHARLES A. KEIGWIN,
Solicitors for Plaintiffs.

172 *Order Substituting Walter L. Fisher as Defendant.*

Filed November 1, 1911.

* * * * * * *

It appearing to the Court that the defendant Richard A. Ballinger has resigned the office of Secretary of the Interior, and that Walter L. Fisher has been regularly appointed thereto and has qualified as Secretary of the Interior, it is, this 1st day of November, 1911,

Ordered, on the application of the complainants, and with the assent of the attorneys for the defendants, that the said Walter L. Fisher as said Secretary of the Interior be substituted as defendant hereto, and that this cause be maintained against him as the successor in office to the original defendant, Richard A. Ballinger.

By the Court:

WRIGHT, *Justice.*

We consent:
C. E. WRIGHT,
Attorney for Defendants.
CHARLES A. KEIGWIN,
Attorney for Plaintiffs.

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POST OFFICE DEPARTMENT,
WASHINGTON, D. C., *May* 10, 1913.

I certify that the annexed is a true copy taken from the files and records of this Department.

In testimony whereof, I have hereunto set my hand, and caused

the seal of the Post Office Department to be affixed, the day and year above written.

[SEAL.]

A. S. BURLESON,
Postmaster General.

M. O. E.

174 POST OFFICE DEPARTMENT, W. I. D.
SECOND ASSISTANT POSTMASTER GENERAL,
WASHINGTON, *January* 11, 1913.

Charles A. Keigwin, Esquire, Attorney at Law, Bond Building, Washington, D. C.

SIR: Referring to your recent personal call at this office, requesting to be advised as to the time required for the transmission of a letter mailed at Santa Fe, New Mexico, March 27, 1864, to Washington, D. C., I have to inform you that the Department has no way of determining the actual time of transit of the mails between the points mentioned at that time. However, the following shows the routes over which it is probable the mails were carried and the schedule on each route:

Star route No. 14465, Kansas City to Santa Fe; leave Santa Fe Mondays at noon; arrive at Kansas City in 15 days. Thirty days were allowed the contractor each way to transport book and document mails.

Star route No. —, Independence by Kansas City to Weston, Missouri, service daily except Sunday; time between Kansas City and Independence 3 hours.

Star route No. 10546, Independence to Dresden; service daily; 24 hours each way.

175 Railroad route No. 10401, St. Louis to Dresden, Missouri, service daily except Sunday; leave Dresden 4 a. m., arrive at St. Louis 7:25 p. m.

Railroad route No. 11506, Chicago to St. Louis, service daily except Sunday; leave St. Louis 6:30 a. m.; arrive Chicago 10 p. m.

Railroad route No. 9051, Pittsburgh to Chicago; service daily except Sunday; leave Chicago 7:35 a. m.; arrive Pittsburgh next day at 2:20 a. m.

Railroad route No. 2201; Philadelphia by Harrisburg to Pittsburgh; service daily; leave Pittsburgh 6 a. m. and 9 p. m.; arrive Philadelphia 5:10 p. m. and 10:05 a. m.

Railroad route No. 3204; Sunbury by Harrisburg, connecting point of route No. 2201, to Baltimore; service daily; leave Sunbury 10:50 a. m. and 1:41 p. m.; arrive Baltimore 6:20 p. m. and 7:15 a. m.

Railroad route No. 3208; Baltimore to Washington; service 4 times a day; 1 hour and 30 minutes each way.

Very respectfully,

JOSEPH STEWART,
Second Assistant Postmaster General.

176 *Stipulation Admitting Exhibits.*

Filed January 29, 1913.

In the Supreme Court of the District of Columbia.

In Equity. No. 28207.

CORNELIUS C. WATTS et al., Plaintiffs,
against
WALTER L. FISHER et al., Defendants.

It is hereby stipulated and agreed that the proposed exhibits on behalf of the defendants, numbered from 1 to 56, both inclusive, omitting numbers 35, 39, 40, 44 and 46, and the objections thereto appearing on the face sheet accompanying each of said exhibits, attached to and following this stipulation, as well as the general objections first stated, shall be considered upon the hearing of the above entitled suit with the same force and effect as if said exhibits had been offered in evidence before an Examiner of this Court and the objections then made thereto upon the record; and that said exhibits and objections shall be incorporated in the record of the above entitled suit in the same manner and with the same force and effect as if the exhibits had been offered and the objections made upon a hearing before an Examiner appointed for the purpose of taking testimony in said suit.

And it is hereby further stipulated and agreed that the appointment of an Examiner to take testimony and the holding of
177 a hearing for the purpose of offering said exhibits and making said objections, and the making of a record showing the proceedings before such Examiner, is hereby waived, and this stipulation shall take the place of such record of a hearing before an Examiner.

Dated, January 23, 1913.

HARTWELL P. HEATH,
Solicitor for Plaintiffs.
CHARLES W. COBB,
F. W. CLEMENTS,
C. EDWARD WRIGHT,
Att'ys for Def'ts.

178 The plaintiffs object to the admission or consideration:

1. Of all of the defendants' proposed exhibits subsequent in date to April 9, 1864 (except insofar as they contain admissions against interest on the part of the defendants or in favor of the plaintiffs), on the ground that the action of J. M. Edmunds as Commissioner of the General Land Office on that date (Defendants' Exhibit No. 56), approving the location of Baca Float No. 3 made June 17, 1863, and ordering survey, vested the title to the land selected under Baca Float No. 3 on June 17, 1863 in the heirs of Luis

Maria Cabeza de Baca, and deprived the Land Department of the Government from that date of any further jurisdiction in the case.

2. Of any of the defendants' proposed exhibits bearing date or having to do with acts of the Land Department of the United States subsequent to April 9, 1864 (except insofar as they contain admissions against interest on the part of the defendants or in favor of the plaintiffs), on the ground that on that date, or prior thereto, title to the selection of Baca Float No. 3 of June 17, 1863 had vested in the heirs of Luis Maria Cabeza de Baca, and said Land Department had lost jurisdiction thereof.

3. Of the defendants' proposed exhibits consisting of decisions of the Land Department which are reported in the volumes of Land Decisions, on the ground that the said decisions, as reported, may be read from the published reports upon the hearing, and it
179 is not necessary for any purpose for which said decisions are properly to be considered that they should be introduced in evidence as exhibits, and the only effect of their admission as exhibits is to encumber the record and increase the cost thereof; and on the further ground that the said decisions are not evidence of the facts therein stated.

180 DEFENDANTS' EXHIBIT NO. 1.

Counsel for defendants offer in evidence officially exemplified copy of the original letter on file in the General Land Office from the Surveyor-General of New Mexico to the Commissioner of the General Land Office dated November 8, 1862, referred to on page 12 of the answer, and mark the same "Defendants' Exhibit No. 1."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 1, on the ground that it is incompetent, irrelevant and immaterial, since the officers of the United States, whose duty it was under the act of June 21, 1860, and the other laws of the United States subsequently approved the selection of June 17, 1863, and title thereto vested in the heirs of Luis Maria Cabeza de Baca; on the further ground that the United States accepted the relinquishment of the location at the "Bosque Redondo" on the Pecos River in New Mexico, and subsequently otherwise disposed of the lands covered by said location; and on the further ground that the said location at the "Bosque Redondo" never ripened into a complete location of said Float.

181 DEFENDANTS' EXHIBIT NO. 2.

Counsel for defendants offer in evidence officially exemplified copy of the original certificate of the Surveyor-General of New Mexico dated October 31, 1862, and of the certificate of the Register and Receiver of the United States Land Office, referred to on pages 13-15 of the answer, and mark the same "Defendants' Exhibit No. 2."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 2, on the ground that it is incompetent, irrelevant and immaterial, since the officers of the United States, whose duty it

was under the Act of June 21, 1860, and the other laws of the United States, subsequently approved the selection of June 17, 1863, and title thereto vested in the heirs of Luis Maria Cabeza de Baca; on the further ground that the United States accepted the relinquishment of the location at the "Bosque Redondo" on the Pecos River in New Mexico, and subsequently otherwise disposed of the lands covered by said location; and on the further ground that the said location at the "Bosque Redondo" never ripened into a complete location of said Float.

182 DEFENDANTS' EXHIBIT No. 3.

Counsel for defendants offer in evidence a duly certified copy of an original letter from John S. Watts to the Commissioner of the General Land Office dated January 18, 1863, on file in the General Land Office, referred to on pages 15-16 of the answer, and mark the same "Defendants' Exhibit No. 3."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 3, on the ground that it is incompetent, irrelevant and immaterial, since the officers of the United States, whose duty it was under the act of June 21, 1860, and the other laws of the United States, subsequently approved the selection of June 17, 1863, and title thereto vested in the heirs of Luis Maria Cabeza de Baca; on the further ground that the United States accepted the relinquishment of the location at the "Bosque Redondo" on the Pecos River in New Mexico, and subsequently otherwise disposed of the lands covered by said location; and on the further ground that the said location at the "Bosque Redondo" never ripened into a complete location of said Float.

183 DEFENDANTS' EXHIBIT No. 4.

Counsel for defendants offer in evidence certified copy from the official record in the General Land Office of a letter from the Commissioner of the General Land Office to the Surveyor-General of New Mexico dated February 5, 1863, referred to on pages 16-17 of the answer, and mark the same "Defendants' Exhibit No. 4."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 4, on the ground that it is incompetent, irrelevant and immaterial, since the officers of the United States, whose duty it was under the act of June 21, 1860, and of the other laws of the United States, subsequently approved the selection of June 17, 1863, and title thereto vested in the heirs of Luis Maria Cabeza de Baca; on the further ground that the United States accepted the relinquishment of the location at the "Bosque Redondo" on the Pecos River in New Mexico, and subsequently otherwise disposed of the lands covered by said location; and on the further ground that the said location at the "Bosque Redondo" never ripened into a complete location of said Float.

184 DEFENDANTS' EXHIBIT No. 5.

Counsel for defendants offer in evidence certified copies of letters from the Commissioner of the General Land Office to Levi Bashford, Surveyor-General of Arizona, dated May 27, 1863, June 8, 1863, June 11, 1863, and July 6, 1863, exemplified from the official records thereof in the General Land Office, referred to on pages 17-18 of the answer, and mark the same "Defendants' Exhibit No. 5."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 5, on the ground that it is incompetent, irrelevant and immaterial, for the reason that the act of June 21, 1860, specifically designated the Surveyor-General of New Mexico as the officer to make the survey; on the further ground that the location of the office of the newly appointed Surveyor-General of Arizona was not established until July 6, 1863, and the Surveyor-General did not reach his destination and assume his duties until January 25, 1864, after the expiration of the three years within which the selection was authorized by said act to be made; and on the further ground that Exhibit No. 5 is a photograph of copies of letters retained in the General Land Office, and no proper foundation has been laid for the introduction of such copies.

185 "B." DEPARTMENT OF THE INTERIOR,
M. E. L. GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 23, 1910.

I hereby certify that the annexed copies of office letters dated May 27, 1863, June 8, 1863, June 11, 1863, July 6, 1863, are true and literal exemplifications from the record of said letters in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

186 GENERAL LAND OFFICE, *May 27th*, 1863.

SIR: The President of the United States has appointed you Surveyor General for the Territory of Arizona, and your commission as such will be transmitted to you upon the receipt of the enclosed blank form of bond to be executed by you with two or more good and sufficient securities, in the penalty of Thirty thousand dollars.

The sufficiency of sureties must be certified by the United States District Judge or Attorney. This bond is to be dated, and the names of the principal and sureties in the body of the bond, and also the names of the witnesses, when signed, are to be written out in full. The place of residence of each surety must be designated in the body of the instrument. A separate seal affixed with a wafer, must be fixed opposite to the signature of the principal and each of the sureties; and each of such signatures is to be attested by Two Witnesses, and the Residence of each Witness must be designated opposite to

his signature. The Affidavits of your sureties as to their Responsibility will accompany the bond. Your sureties must qualify in double the amount of the penalty of the bond, and in accordance with the accompanying printed forms.

Care should be taken that no erasures or mutulations of any kind be made, and, if any made, all such will be stated and certified before signing.

187 The oath required by law to support the constitution of the United States, and well and faithfully to execute the Trust committed to you, must be taken by you and endorsed on the bond. If the oath be taken before a Justice of the Peace a certificate of Magistracy, under seal should accompany it. The oath and bond are to bear the same date.

When the bond is executed in strict conformity to the prescribed formality (which you will be careful to see is the fact) you will transmit it to this office by mail, under a sealed envelope. Please acknowledge the receipt of your bond without delay and return it to this office as soon as practicable. Your salary will commence when you enter upon duty in the Territory, see act 24th Feb'y /63.

Very respectfully,
Your obt. sevt.,

JOS. S. WILSON,
Acting Commissioner.

To Levi Bashford, Present.

Commission.

GENERAL LAND OFFICE, *June* 8, 1863.

Levi Bashford, Sur. Gen. Arizona Ter., Present.

SIR: Your official bond as Surveyor General for the Terri-
188 tory of Arizona has been executed in accordance with instructions from this office dated 27th ultimo, and I now en-
J. W. K. close your commission as such, bearing date May 26th 1863.

General instructions &c. will be immediately prepared and sent to your address of which you will please keep this office advised.

The question of the site of the office will be submitted for the direction of the executive and you advised accordingly.

Very respectfully,
Your obt. svt.,

JOS. S. WILSON,
Act'g Commissioner.

Bond Approved.

GENERAL LAND OFFICE, *June* 11, 1863.

Levi Bashford, Esq., Sur. Gen. Arizona, Oshkosh, Wisconsin.

SIR: Your official bond dated June 2d /63 as Surveyor General of Arizona Territory is approved.

Very respectfully,
Your obt. sevt.,

J. M. EDMUNDS,
Commissioner.

189 Office at Tucson. Ack. August 2, 1863. J. H. H.

GENERAL LAND OFFICE, *July 6th*, 1863.

Levi Bashford, Esq., Surveyor General of Arizona, Oshkosh, Wis.

SIR: I have to advise you that the Secretary of the Interior directs that the office of the Surveyor General of Arizona be established at Tucson.

Very respectfully,
Your obt. serv.,

J. M. EDMUNDS,
Commissioner.

190 DEFENDANTS' EXHIBIT No. 6.

Counsel for defendants offer in evidence officially exemplified copy from the original thereof on file in the General Land Office, of so much of "Bond Book, Volume 2, General Land Office," as shows the appointment and qualification of Levi Bashford as Surveyor-General of New Mexico, referred to on pages 17-18 of the answer, and mark the same "Defendants' Exhibit No. 6."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 6, on the ground that it is incompetent, irrelevant and immaterial, for the reason that the act of June 21, 1860, specifically designated the Surveyor-General of New Mexico as the officer to make the survey; on the further ground that the location of the office of the newly appointed Surveyor-General of Arizona was not established until July 6, 1863, and the Surveyor-General did not reach his destination and assume his duties until January 25, 1864, after the expiration of the three years within which the selection was authorized by said act to be made.

A. D. H. DEPARTMENT OF THE INTERIOR,
191 K. GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 23, 1910.

I hereby certify that the annexed copy of so much of "Bond Book, Vol. 2, General Land Office," as shows the appointment and qualification of Levi Bashford as Surveyor General of Arizona, is a true and literal exemplification from the original thereof on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

H. W. SANFORD,
Recorder of the General Land Office.

[Register]* Sur. Gen'l.	Receiver.	Date of commission.	From what period.	Commission expires.	When sent.	Date of bond.	Date of oath.	Penalty.	When sent to Comptroller.	Remarks.
Levi Bashford.		6 May, 1863.	Temporary.	.....	27 May, 1863.	2d June, 1863.	2d June, 1863.	30,000	8 June to Sec'y, 1863; 11 June to Compt., 1863.	....

[Word in brackets erased in copy]

193 DEFENDANTS' EXHIBIT No. 7.

Counsel for defendants offer in evidence an officially exemplified copy from the official record of a letter in the General Land Office from the Acting Commissioner of said office to the Surveyor-General of New Mexico dated June 3, 1863, referred to on page 18 of the answer, and mark the same "Defendants' Exhibit No. 7."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 7, on the ground that it is incompetent, irrelevant and immaterial, for the reason that the act of June 21, 1860, specifically designated the Surveyor-General of New Mexico as the officer to make the survey; on the further ground that the location of the office of the newly appointed Surveyor-General of Arizona was not established until July 6, 1863, and the Surveyor-General did not reach his destination and assume his duties until January 25, 1864, after the expiration of the three years within which the selection was authorized by said act to be made; on the further ground that the instructions contained in Exhibit No. 7, that the costs of the survey should be paid by the claimants, under the act of June 2, 1862, were not applicable to the Baca heirs; and on the further ground that Exhibit No. 7 is a photograph of a copy of a letter retained in the General Land Office, and no proper foundation has been laid for the introduction of such copy.

194 "B." M. E. L.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 23, 1910.

I hereby certify that the annexed copy of office letter dated June 3, 1863, is a true and literal exemplification from the record of said letter in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

H. W. SANFORD,
Recorder of the General Land Office.

195 GENERAL LAND OFFICE, *June 3d*, 1863.

John A. Clark, Esq., Surveyor General, Santa Fe, New Mexico.

Annual Instructions.

SIR: I have to advise you that by the act of Congress approved February 25th 1863 entitled "An Act Making appropriations for the Legislative Executive and Judicial expenses of the Government &c." there is appropriated for the Surveying service in New Mexico for the fiscal year ending June 30th 1864 the following sums:

$3,000. Salaries of Sur. Genl. [& cl'ks.]* $2,000 Translator. $2,000 Rent & Incid'l expenses.

(1st) For compensation of the Surveyor General of New Mexico & the clerks in his office three thousand dollars. $3,000

(2) For compensation of translator in the office of the Surveyor General of New Mexico..... $2,000

(3d) For rent of the office of Surveyor General in New Mexico fuel, books stationery & other incidentals..... $2,000

$3,000. Sur. Gen'l's Salary.

The appropriation under the 1st head is intended for the compensation of the Surveyor General exclusively which is $3,000

No estimate for the compensation of the clerks in the Surveyor General's office has been submitted to Congress owing to the fact that the appropriation of $4,000./00 Act of March 14th 1862 which in consequence of the diminution of the public service during the year ending June 30th 1863 will not have been expended by about $4,000. which is sufficient to cover all legitimate liabilities that may be incurred by you during the next fiscal year for the dispatch of the office work which should keep pace with that in the field, limited hereby to the sum of $6,000. which sum it is calculated will remain unexpended of all former appropriations over and above legal liabilities to be liquidated under existing contracts.

Former appropriation for Compensation of Clerks adequate to the wants.

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$6,000 Estimated bal. of former approp. for surveys.

The appropriations under the 2d head in addition to unexpended balance of the last year's appropriation is more than adequate for the payment of the translator in your office and in submitting your next estimate for the same service for the fiscal year ending June 30th 1865 you will take into account the probable balance that will be left of the former appropriations and reduce *to* estimate to that extent.

Translator.

The appropriation under the 3d head in connection with the unexpended balance of former appropriations, will it is expected be more than sufficient for the liquidation of the Incidental expenses of your office during the ensuing fiscal year, and whatever balance will remain unexpended on the 30th June 1864 you will take into account in submitting your estimates for the year ending 30th June 1865, for that branch of the public service.

Incid'l Expenses.

The item of $2,500. for fuel office rent stationery and contingent expenses "Estimated by you in your last annual Report was reduced by Congress to

[* Words enclosed in brackets erased in copy.]

$2,000. and an appropriation was made of that amount, you will understand however that no
197 part of this appropriation can be applied to pay the cost of summoning witnesses or prosecuting investigations contemplated by the Act of 22d July 1854. The policy indicated in our instructions to your predecessor dated October 4th 1855 is adhered to requiring claimants under Spanish & Mexican grants by Virtue of the 5th article of the Treaty of Guadalupe Hidalgo of February 2d 1848 to produce their own witnesses and at their own expense.

Cost of summoning witnesses at the expenses of parties.

By a subsequent Act of Congress approved June 2d 1862 it is also further provided that the survey of such claims shall be made at the cost of the parties claiming or owning the same, therefore any expense incurred in taking the preliminary steps requisite to have such grants surveyed is in the opinion of this office a proper charge against the parties claiming such grants.

By the first section of the Act of Congress entitled "An Act to provide a temporary government for the Territory of Arizona" &c. approved Feb'y 24th 1863 all that part of what was the Territory of New Mexico which lies west of the 32nd Meridian of Longitude west from Washington is erected into a new Territory Styled the Territory of Arizona. The organic act providing a temporary government for this Territory makes provision for the appointment of a separate Surveyor General and in pursuance of that provision the President has appointed Levi Bashford Esq. Surveyor General for the Territory of Arizona; your surveying District is therefore reduced in extent to the 32d Meridian aforesaid as its western boundary. It appears from the most authentic maps in possession of this office that the 32nd Me-
198 ridian passes a little west of Fort Defiance. North of the head waters of the River San Domingo, the affluant of Rio Gila on the south and some 20 miles west of the Pueblo of Zuim.

Arizona Terr'y Organized to E. Bound'y 32d Merid. from Wash'ton.

You will exercise your own discretion in determining when the $6,000. provided for surveying operations in your District should be expended, your personal knowledge after you shall have completed the reconnoissense authorized by this office on the 21st of January last and in which you are now engaged will enable you to decide what localities have the greatest need for Immediate surveys.

Locality of Surveys.

No appropriation having been made for the establishment of the Northern boundary of New Mexico nothing can be done with regard to definitely locating the line between New Mexico and Colorado Territory.

No appropriation for establish'g North B'y of N. Mex.

Approval of Surv'g Contracts.

In reference to the approval of surveying contracts by this office under the authority of the 1st section of the Act of Congress approved May 30./62 entitled "An Act to reduce the expenses of the survey and sale of the public lands in the "United States" I have to say that my instructions to you of the 10th June last upon the subject are for analogous reasons hereby extended and made to apply to the contracts during the fiscal year ending June 30, 1864.

List of T'ps Survey'd in 3 plicate.

You are required to prepare in triplicate and make a part of your next annual Report the list of townships surveyed prior to June 30 1862 but not embraced in your report of Sept. 29, 1862 as well as the list of townships surveyed since June 30th 1862 and up to June 30th 1863.

Returns of field work in each fiscal year separate.

It has been determined in future to keep 199 the books of returns in this office so as to exhibit the field work actually done each fiscal year separately, you will therefore make your returns accordingly: and when work commenced in one year for good & sufficient reasons not finished in that year, but is continued into the next, the amount in linial miles and the area in acres actually surveyed in each will be particularly stated in the Deputies' accounts transmitted, for settlement. To enable you to do this your Deputies will be required strictly to observe the directions for keeping the field notes, contained in the printed Manual of Surveying Instructions so that the date of each day's work will appear at the close of the operations of the day.

Specific date to be set down in field notes by D. Surveyors.

Revenue Tax of 3 p'r ¢. to be noted in the Salary a/cs. over $600.

The 86th Section of "An Act to provide Internal Revenue &c." approved July 1st 1862 requires a tax of three per cent on all sums exceeding $600. per annum paid on salaries of officers or to persons in the civil or Military employment or service of the United States to be withheld upon settling such accounts. The Secretary of the Treasury under Joint Resolution No. 64, approved July 17th 1862 has determined the commencement of the revenue year to be from and after the first day of September 1862 You are therefore directed in reporting salary accounts and payments to Deputy Surveyors after August next whenever part of the work or labor has been performed in two tax years, to state separately the amounts due for work or labor performed in each.

I send you by today's mail for the use of your

50 Bl'k Contracts 30 Bl'k T'p plats 40 Diagr. N. Mex.

office, 50 blanks Contracts and Bonds, 30 blank township plats and 40 diagrams of New Mexico, embracing also the Territory of Arizona

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Very respectfully, your ob't serv't,

JOS. S. WILSON,
Acting Commissioner.

201 DEFENDANTS' EXHIBIT No. 8.

Counsel for defendants offer in evidence a certified copy of a letter in the General Land Office from Levi Bashford, Surveyor-General of Arizona, addressed to the Commissioner of the General Land Office, dated February 1, 1864, and mark the same "Defendants' Exhibit No. 8."

Counsel for plaintiffs object to the admission of defendants' proposed Exhibit No. 8, on the ground that it is incompetent, irrelevant and immaterial, for the reason that the act of June 21, 1860, specifically designated the Surveyor-General of New Mexico as the officer to make the survey; on the further ground that the location of the office of the newly appointed Surveyor-General of Arizona was not established until July 6, 1863, and the Surveyor-General did not reach his destination and assume his duties until January 25, 1864, after the expiration of the three years within which the selection was authorized by said act to be made, (except insofar as it contains admissions against interest on the part of the defendants or in favor of the plaintiffs).

202 "B."
M. E. L.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 22, 1910.

I hereby certify that the annexed copy of letter dated February 1, 1864, is a true and literal exemplification from the original in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

H. W. SANFORD,
Recorder of the General Land Office.

203

SURVEYOR GENERAL'S OFFICE,
TUCSON, ARIZONA T., *February* 1, 1864.

Hon. J. M. Edmunds, Com'r Gen. Land Office, Washington, D. C.

D. SIR: I arrived here on the 25th of January ultimo, and have opened my office in this place, in pursuance of instructions.

All mail matter can be forwarded to me, as heretofore, by way of Santa Fe, New Mexico.

Yours truly,

LEVI BASHFORD.

(Endorsed:) H. G. 33597. Sur. Gen'l. Tucson, Arizona T., Feb'y 1/1864. States that he arrived at Tucson, A. T., on 25 January, 1864, & opened his office. R. noted. Received at the Gen. Land Office, Washington, D. C., Mar. 28, 1864. Hawes.

204 DEFENDANTS' EXHIBIT No. 9.

Counsel for defendants offer in evidence duly exemplified copy of the original certificate of location on file in the General Land Office, dated June 17, 1863; and mark the same "Defendants' Exhibit No. 9."

Counsel for plaintiffs object to the admission of the endorsements upon defendants' proposed Exhibit No. 9, on the ground that they are incompetent, irrelevant and immaterial, for the reason that they were made in the General Land Office, and are not evidence of the facts therein stated or in any way binding upon the plaintiffs or their predecessors in title.

205 B. M. E. L.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, *April* 27, 1912.

I hereby certify that the annexed copy is a true and literal exemplification of the original paper on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

JOHN O'CONNELL,
Acting Recorder of the General Land Office.

206

SURVEYOR GENERAL'S OFFICE,
SANTA FE, NEW MEXICO, *June* 17, 1863.

I, John A. Clark, Surveyor General of New Mexico, do hereby certify that on this day John S. Watts, Esqr., in behalf of the heirs of Luis Maria Cabeza de Baca, filed in this office an application in the words and figures following, viz:

SANTA FE, NEW MEXICO, *June* 17, 1863.

"John A. Clark, Surveyor General, Santa Fe, New Mexico:

"I, John S. Watts the attorney of the heirs of Don Luis Maria Cabeza de Baca, have this day selected as one of the five locations confirmed to said heirs under the 6th Section of the act of Congress, approved June 21, 1860, the following tract to wit: Commencing at a point one mile and a half from the base of the Salero mountain, in a direction North forty five degrees East of the highest point of said mountain, running thence from said beginning point, West, twelve miles, thirty six chains and forty four links, thence South, twelve miles, thirty six chains and forty four links, thence East, twelve miles, thirty six chains and forty four links, thence North twelve miles thirty six chains and forty four links, to the place of beginning; the same being situate in that portion of New Mexico, now included by act of Congress, approved February 24th
207 1863, in the Territory of Arizona—Said tract of land is entirely vacant, unclaimed by any one, and is not mineral to my knowledge.

JOHN S. WATTS,
Attorney for the Heirs of Luis Maria Cabeza de Baca."

And I further certify that, the said tract of land being the one fifth part of the private claim confirmed to the said heirs, contains ninety nine thousand, two hundred and eighty nine acres and thirty nine hundredths of an acre, and that this location is the third of the series (application to locate the same, filed in this office October 31, 1862—dated October 30, 1862,—having been withdrawn—See letter of Commissioner of the General Land Office dated February 5, 1863) and, with the three locations, numbered one, two and four heretofore made, includes four fifths of the said private claim confirmed to the heirs of Luis Maria Cabeza de Baca, by the act of Congress approved June 21, 1860—Said location is hereby approved.

In witness whereof I have hereto set my hand this 17th day of June 1863.

JOHN A. CLARK,
Surveyor General.

(Endorsed:) In the matter of location of claim confirmed to the heirs of Luis Maria Cabeza de Baca. Certificate of location No. 3—June 17, 1863. For description of corrected location see letter from Jno. S. Watts Ap'l 30, 1866.

208 DEFENDANTS' EXHIBIT No. 10.

Counsel for defendants offer in evidence duly certified copy of an original letter on file in the General Land Office, dated June 18, 1863, from John A. Clark, Surveyor General, to the Commissioner of the General Land Office; and mark the same "Defendants' Exhibit No. 10."

Counsel for plaintiffs object to the admission of the endorsements upon defendants' proposed Exhibit No. 10, on the ground that they are incompetent, irrelevant and immaterial, for the reason that they were made in the General Land Office, and are not evidence of the facts therein stated, or in any way binding upon the plaintiffs or their predecessors in title.

209 B. M. E. L.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, *April* 27, 1912.

I hereby certify that the annexed copy is a true and literal exemplification of the original letter on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

JOHN O'CONNELL,
Acting Recorder of the General Land Office.

210 SURVEYOR GENERAL'S OFFICE,
SANTA FE, NEW MEXICO, *June* 18, 1863.

Hon. J. M. Edmunds, Comm'r of General Land Office, Washington City, D. C.

SIR: I enclose herewith copy of the application and certificate of location No. 3, of the private claim confirmed to the heirs of Luis Maria Cabeza de Baca.

As this location is far beyond any of the public surveys, I have not deemed it necessary to procure any certificate from the Register & Receiver of the Land Office as from the nature of the case, they cannot officially know anything concerning it—

I am respectfully your
Obt. Servt.,

JOHN A. CLARK,
Surveyor General.

(Endorsed:) G. 21,269. #—. Sur. General. Santa Fe, New Mex., June 18/1863. Encloses the application and certf. of
211 location [of the]* 11°3, of the private claim [of]* confirmed to the Heirs of Louis Maria Cabeza de Baca, —. No. 3. Outside of the existing surveys in Arizona Territory. Santa Fe, N. Mex., Jun- 22. Ans'd July 18, 1863. See instructions to Sur. Gen'l of Arizona to Survey dated April 9, 1864. See to Sec'y Int. Feb'y 14, 1884, Div. K. Received Gen'l Land Office, Washington, D. C., July 13, 1863.

212 DEFENDANTS' EXHIBIT No. 11.

Counsel for defendants offer in evidence duly exemplified copy from the official record copy on file in the General Land Office of a letter dated July 18, 1863, from the Commissioner of the General Land Office to the Surveyor-General of New Mexico; and mark the same "Defendants' Exhibit No. 11."

B.
M. E. L.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, *April* 27, 1912.

I hereby certify that the annexed copy of office dated July 18, 1863, is a true and literal exemplification from the record of letters in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

JOHN O'CONNELL,
Acting Recorder of the General Land Office.

[* Words enclosed in brackets erased in copy.]

213 GENERAL LAND OFFICE, *July* 18, 1863.

John A. Clark, Esq., Surveyor General, Santa Fe, New Mexico.

Luis Maria Cabeza de Baca claim.

SIR: I have to acknowledge the receipt of your letter of the 18th ultimo covering copy of the application of John S. Watts, Esq., in behalf of the heirs of Luis Maria Cabeza de Baca, dated June 17, 1863, filed in your office on the same day, together with your certificate to the effect that the application to locate one fifth of the private claim confirmed to said heirs being within the limits of New Mexico as they existed at the date of the confirmation, viz: June 21, 1860, but actually situated within the present Territory of Ariozna, is the 3d location of the series and with those numbered 1, 2 & 4 heretofore made constitute four fifths of the said private claim.

3d Location Ack. Ap'12, Apr. 2d and answered. J. J. D.

Your approval of the location under consideration is found to have ignored the imperative condition that the land selected at the base of Salero Mountain now included by act of Congress approved February 24, 1863, in the Territory of Arizona, is vacant land and not mineral. Before the application of Location No. 3 of the heirs aforesaid can be approved by this office, it is necessary that our instructions of the 26th July, 1860, should be complied with by furnishing a statement from yourself and Register and Receiver that the land thus selected and embracing one fifth of the claim or 99.289 39/100 acres is vacant and not mineral.

I am very respectfully,
Your obt. servt.,

J. M. EDMUNDS,
Commissioner.

214 DEFENDANTS' EXHIBIT No. 12.

Counsel for defendants offer in evidence a duly certified typewritten and photographic copy of a letter dated April 2, 1864, from the Surveyor-General of New Mexico to the Commissioner of the General Land Office, referred to on page 4 of the answer, and mark the same "Defendants' Exhibit No. 12."

Counsel for plaintiffs make no objection to the admission of defendants' proposed Exhibit No. 12, but reserve the right to examine the original record.

215 K. A. D. H.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 23, 1910.

I hereby certify that the annexed typewritten and photographic copies of letter of April 2, 1864, from John A. Clark, Surveyor General of New Mexico, to the Commissioner of the General Land Office, together with copies of the briefing on such letter, are true and literal exemplifications from the original letter on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

H. W. SANFORD,
Recorder of the General Land Office.

216

APRIL 2D, 1864.

Hon. J. M. Edmunds, Comm'r of the General Land Office, Washington City, D. C.

SIR: I have to acknowledge the receipt on my return to Santa Fe from Arizona, of your letter of 18th July, 1863. In reply I have to state that there is no evidence in the office of the Surveyor General of New Mexico, that the tract of land located by the heirs of Luis Maria Cabeza de Baca, designated as location No. three, contains any mineral, or that it is occupied. There have been no public surveys made in the neighborhood of said tract, and there is no record of, or concerning the land in question in the Surveyor General's office, nor—as I believe—in the office of the Register or Receiver of the Land Office of New Mexico.

As I am personally unacquainted with that region of country, I cannot certify that the land in question is "vacant and not mineral," or otherwise. Those facts can only be determined by actual examination and survey.

I am very respectfully,
Your ob't Servt.,

JOHN A. CLARK,
Surveyor Gen'l, New Mexico.

(Endorsed:) # Q. 34097. Sur. General, New Mexico.
217 Washington, April 2, 1864. In reply to letter of 18th July relating to the location of the heirs of Louis Maria Cabeza de Baca No. 3. M. Hawes. No. 3. Arizona. Received at the Gen'l Land Office, Washington, D. C., Apr. 4, 1864. F. 12.

APRIL 2D, 1864.

Hon. J. M. Edmunds, Comm'r of the General Land Office, Washington City, D. C.

SIR: I have to acknowledge the receipt on my return to Santa Fe from Arizona, of your letter of 18th July, 1863. In reply I have to state that, there is no evidence in the office of the Surveyor General of New Mexico, that the trail of land located by the heirs of Luis Maria Cabeza de Baca, designated as location No. three, contains any mineral, or that it is occupied. There have been no
218 public surveys made in the neighborhood of said trail, and there is no record of, or concerning the land in question in the Surveyor General's Office, nor—as I believe—in the office of the Register or Receiver of the Land Office of New Mexico.

As I am personally unacquainted with that region of country, I cannot certify that the land in question is "vacant and not mineral"

or otherwise. Those facts can only be determined by actual examination and survey."

I am very respectfully,
Your obt. servt.,

JOHN A. CLARK,
Surveyor Gen'l, New Mexico.

G. 34097. Sur. General, New Mexico. Washington, April 2, 1864. In reply to letter of 18th July relating to the location of the heirs of Louis Maria Cabeza de Baca No. 3. R. "F." 12. Received at the Gen. Land Office, Washington, D. C., Apr. 4, 1864. Hawes.

219 DEFENDANTS' EXHIBIT No. 13.

Counsel for defendants offer in evidence certified typewritten and photographic copies of letter dated March 27, 1864, and received at the General Land Office May 26, 1864, from John S. Watts to W. Wrightson, and of inclosures, to-wit: copy of application to select, dated June 17, 1863, and of certificate of Register and Receiver of the United States Land Office at Santa Fe, New Mexico, dated March 25, 1864, from the originals on file in the General Land Office, referred to on page 19 of the answer, and mark the same "Defendants' Exhibit No. 13."

Counsel for plaintiffs object to the admission of defendants' proposed Exhibit No. 13 insofar as the endorsement upon the alleged letter from John S. Watts to William Wrightson, dated March 27, 1864, is concerned, on the ground that it is incompetent, irrelevant and immaterial, for the reason that it was made in the General Land Office and is not proper evidence of the facts therein stated, or in any way binding upon the plaintiffs or their predecessors in title; and for the further reason that it has no tendency to show that the certificates of the Register and Receiver of the Land Office, dated March 25, 1864, were not received at the General Land Office prior to the date of said endorsement.

220 K. DEPARTMENT OF THE INTERIOR,
A. D. H. GENERAL LAND OFFICE.
WASHINGTON, D. C., *November* 23, 1910.

I hereby certify that the annexed typewritten and photographic copies of letter of March 27, 1864, from John S. Watts, and certificates of the Register and Receiver of the United States Land Office at Santa Fe, New Mexico, dated March 25, 1864, are true and literal exemplifications from the originals thereof on file in this office, and that the annexed copy of an application by John S. Watts, dated June 17, 1863, is a true and literal exemplification of a copy thereof on file in this office, on the back of which copy are written the original certificates of the Register and Receiver above mentioned.

In testimony whereof I have hereunto subscribed my name and

caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

221 SANTA FE, N. M., *March* 27, 1864.

W. Wrightson, Esqr.

DEAR SIR: You will please find enclosed the certificate of the Register and Receiver that the location made in Arizona is vacant and not mineral so far as the records of their office show. I hope this certificate will enable you to get the location confirmed. With kind regards,

I remain yours &c.,

JOHN S. WATTS.

(Endorsed:) 137,373. Received at the Gen. Land Office, Washington, D. C., May 26, 1864. John S. Watts, Santa Fe, N. Mex., March 27/64. Encloses a Certificate of the Regr. at Santa Fe, N. M., to a location No. 3 for the heirs of Luis Maria Cabeza de Baca, in Arizona. M. Hawes. File with the case. Hawes.

222 Copy.

SANTA FE, NEW MEXICO, *June* 17, 1863.

John A. Clark, Surveyor General, Santa Fe, New Mexico:

I, John S. Watts, the attorney of the heirs of Don Luis Maria Cabeza de Baca, have this day selected as one of the five locations confirmed to said heirs under the 6th section of the act of Congress approved June 21, 1860, the following tract, to wit: Commencing at a point one mile and a half from the base of the Salero mountain in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles thirty-six chains and forty-four links, thence south twelve miles thirty-six chains and forty-four links, thence east twelve miles thirty-six chains and forty-four links, thence north twelve miles thirty-six chains and forty-four links, to the place of beginning, the same being situate in that portion of New Mexico now included by act of Congress approved February 24, 1863, in the Territory of Arizona—said tract of land is entirely vacant, unclaimed by any one, and is not mineral to my knowledge.

(Signed) JOHN S. WATTS,
Attorney for the Heirs of
Luis Maria Cabeza de Baca.

223 UNITED STATES LAND OFFICE,
SANTA FE, NEW MEXICO, *March 25th*, 1864.

I hereby certify that the lands embraced in the description of the foregoing application of John S. Watts Esqr., Att'y for the heirs of

Luis Maria Cabeza de Baca, are unsurveyed & from all information in this office are vacant and not mineral.

J. HOUGHTON, *Register.*

UNITED STATES LAND OFFICE,
SANTA FE, NEW MEXICO, *March* 25, 1864.

I hereby certify that the land embraced in the description of the foregoing application of John S. Watts, Esqr., Attorney for the heirs of Luis Cabeza de Baca are vacant and not mineral so far as the records of this office show (not having been surveyed).

JOHN GREINER,
Receiver, &c.

224 SANTA FE, N. M., *March* 27, 1864.

W. Wrightson, Esqr.

DEAR SIR: You will please find enclosed the certificate of the Register and Receiver that the location made in Arizona is vacant and not mineral so far as the records of their office show. I hope this certificate will enable you to get the location confirmed. With kind regards I remain yours &c.,

JOHN S. WATTS.

#137,373. T 2. Received at the Gen. Lan- —, Washington, D. C., May 26, 1864. John Watts, Santa Fe, N. Mex., March 27/64. Enclosed a Certificate of the Regr. at Santa Fe in ref. to a location for the heirs of Luis Maria Cabeza de Baca. R. "E." 10. 1 enclosure.

225 Copy.

U–1.

SANTA FE, NEW MEXICO, *June* 17, 1863.

John A. Clark, Surveyor General, Santa Fe, New Mexico:

I, John S. Watts, the attorney of the heirs of Don Luis Maria Cabeza de Baca, have this day selected as one of the five locations confirmed to said heirs under the 6th section of the act of Congress approved June 21, 1860, the following tract, to wit:— Commencing at a point one mile and a half from the base of the Salero Mountain in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles thirty-six chains and forty-four links, thence south twelve miles thirty-six chains and forty-four links, thence east twelve miles thirty-six chains and forty-four links, thence north twelve miles thirty-six chains and forty-four links, to the place of beginning, the same being situate in that portion of New Mexico now included by act of Congress approved February 24, 1863, in the Territory of Arizona— said tract of land is entirely vacant, unclaimed by any one, and is not mineral to my knowledge.

(Signed) JOHN S. WATTS,
Attorney for the Heirs of
Luis Maria Cabeza de Baca.

226 **U–2.**

UNITED STATES LAND OFFICE,
SANTA FE, NEW MEXICO, *March 25th,* 1864.

I hereby Certify that the lands embraced in the description of the foregoing application of John S. Watts Esqr. att'y for the heirs of Luis Maria Cabeza de Baca are unsurveyed & from all information in this office are vacant and not mineral.

J. HOUGHTON, *Register.*

UNITED STATES LAND OFFICE,
SANTA FE, NEW MEXICO, *March* 25, 1864.

I hereby certify that the land embraced in the description of the foregoing application of John S. Watts Esqr. Attorney for the Heirs of Luis Cabeza de Baca are vacant and not mineral so far as the records of this office show (not having been surveyed).

JOHN GREINER,
Receiver, &c.

227 DEFENDANTS' EXHIBIT No. 14.

Counsel for defendants offer in evidence duly exemplified copy of a letter in the General Land Office dated April 30, 1866, addressed to the Commissioner of said office, and signed by John S. Watts, attorney; and mark the same "Defendants' Exhibit No. 14."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 14, on the ground that it is incompetent, irrelevant and immaterial, for the reason that it appears upon its face to be a copy of a copy, and no foundation has been laid for the introduction of such a paper; for the further reason that there was no authority in law for the relocation of said Float; and for the further reason that it attempts to avoid the location of June 17, 1863.

228 DEFENDANTS' EXHIBIT No. 15.

Counsel for defendants offer in evidence duly certified copy from the official record of the General Land Office of a letter dated May 21, 1866, from the Commissioner of the General Land Office to John A. Clark, Surveyor-General of New Mexico; and mark the same "Defendants' Exhibit No. 15."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 15, on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a copy of a copy of a letter in the General Land Office, and no foundation has been laid for the introduction of such a paper; for the further reason that it is an attempt to permit the re-relocation of said Float without authority of law; for the further reason that it was afterwards held by the decision of Secretary Lamar of June 15, 1887, to have been unauthorized; and for the further reason that it is not evidence of the facts therein stated.

229 DEFENDANTS' EXHIBIT No. 16.

Counsel for defendants offer in evidence a duly certified copy of a letter on file in the General Land Office, dated June 11, 1866, from John A. Clark, Surveyor-General of New Mexico, to the Commissioner of the General Land Office, referred to on pages 23-24 of the answer, and mark the same "Defendants' Exhibit No. 16."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 16, on the ground that it is incompetent, irrelevant and immaterial, for the reason that it relates to the proposed relocation of said Float, which was unauthorized and invalid; and for the further reason that it requires, without authority of law, the deposit by claimants of the costs of survey under the act of June 2, 1862.

230 DEFENDANTS' EXHIBIT No. 17.

Counsel for defendants offer in evidence duly certified copy of the record copy on file in the General Land Office of a letter from the Commissioner of the General Land Office to John S. Watts, dated July 2, 1866, referred to on pages 24-25 of the answer, and mark the same "Defendants' Exhibit No. 17."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 17, on the ground that it is incompetent, irrelevant and immaterial, and for the reason that it is a copy of a copy of a letter in the General Land Office, and no foundation has been laid for the introduction of such a paper; for the further reason that it relates to the attempted relocation of the Float, which was unauthorized; for the further reason that it requires, without authority of law, the payment of the costs of the survey by the claimants under the act of June 2, 1862; and for the further reason that it attempts to amend the instructions issued April 9, 1864.

231 DEFENDANTS' EXHIBIT No. 18.

Counsel for defendants offer in evidence *offer in evidence* duly exemplified copy of a letter on file in the General Land Office dated August 15, 1877, from J. *H.* Watts to the Commissioner of the General Land Office, referred to on pages 26-27 of the answer, and mark the same "Defendants' Exhibit No. 18."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 18, on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is an unauthorized attempt to re-relocate the said Float; for the further reason that it is not evidence of the facts therein stated.

232 DEFENDANTS' EXHIBIT No. 19.

Counsel for defendants offer in evidence duly certified copy of the official record copy of a letter on file in the General Land Office from the Commissioner of the General Land Office to J. H. Watts dated

September 20, 1877, referred to on pages 27-29 of the answer, and mark the same "Defendants' Exhibit No. 19."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 19, on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a copy of a copy of a letter, and no foundation has been laid for the introduction of such a paper; for the further reason that it relates to the unauthorized attempt to re-relocate the said Float; and for the further reason that it deals with an application made by a stranger to plaintiffs' title.

233 DEFENDANTS' EXHIBIT No. 20.

Counsel for defendants offer in evidence duly certified copy of a letter on file in the General Land Office from Charles D. Poston, assignee of the heirs of Luis Maria Baca, to the Commissioner of the General Land Office, dated October 10, 1877, referred to on pages 29-31 of the answer, and mark the same "Defendants' Exhibit No. 20."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 20, on the ground that it is incompetent, irrelevant and immaterial, for the reason that Charles D. Poston is not shown to have had any authority to act in the matter and is an entire stranger to the title, as appears from the record; for the reason that it deals with an attempt to relocate said Float and to avoid the title vested in the heirs of Luis Maria Cabeza de Baca to the selection of June 17, 1863; and for the further reason that it is not proof of any of the facts therein stated.

234 DEFENDANTS' EXHIBIT No. 21.

Counsel for defendants offer in evidence duly certified copy from the original record thereof in the General Land Office of a letter dated July 18, 1882, addressed to the Secretary of the Interior, signed by the Commissioner of the General Land Office, and mark the same "Defendants' Exhibit No. 21."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 21, on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a copy of a copy, and no foundation has been laid for the introduction of such a paper; and for the further reason that it is an unauthorized attempt to relocate the Baca Float and to divest the title of the Baca heirs to the selection of June 17, 1863.

235 "B." DEPARTMENT OF THE INTERIOR,
M. E. L. GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 23, 1910.

I hereby certify that the annexed copy of office letter dated July 18, 1882, is a true and literal exemplification from the record of said letter in this office.

In testimony whereof I have hereunto subscribed my name and

caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

236 L. H. C. K.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July* 18, 1862.

Hon. H. M. Teller, Secretary of the Interior.

SIR: I have the honor to acknowledge receipt by reference from you of the letter of the Hon. P. B. Plumb, Chairman of Senate Committee on Public Lands, dated on the 11th instant, transmitting memorial and petition of John C. Robinson of New York, concerning title to a tract of land in Arizona, and requesting the views of the Department thereon.

By the sixth section of the Act of Congress approved June 2, 1860, it was prescribed that it should be lawful for the heirs of Luis Maria Baca who made claim to the tract of land claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number, and that it should be the duty of the Surveyor General of New Mexico to make survey and location of the lands so selected by the said heirs of Baca, when thereunto required by them. It was provided, however, that the right thereby granted to the said heirs of Baca should continue in force during three years from the passage of the act and no longer.

Under this act Mr. John S. Watts Attorney for the heirs of
237 Luis Maria Baca on June 17, 1863, made application to locate one tract, and said application was approved as tract No. 3, by the Surveyor General of New Mexico, on the same date.

Subsequently, on April 30, 1866, Mr. Watts filed an amended application, and on May 21, 1866, instructions were given by this office to the Surveyor General to make the survey according to the amended application.

The survey, however, was not made, primarily because Mr. Watts failed to deposit the sum estimated as necessary to pay the expenses of the survey as required by the Act of June 2, 1862, and latterly, after the repeal of said Act of June 2, 1862, by the Act of February 28, 1871, for the reason that large mineral deposits had been discovered on the tract located.

On July 15, 1877, Mr. Watts, as Attorney and part owner made application to this office for permission to relocate said tract. This application was denied, upon the ground that the proviso to the said sixth section of the Act of June 21, 1860, limited the right to locate for three years, which period having expired this office could not authorize a relocation without special legislation by Congress.

In the opinion of this office this view is sustained by the Act of Congress approved June 17, 1864, by which the heirs of Luis Maria Baca were authorized to withdraw the location theretofore made by

them on the Pecos river adjoining the Fort Sumner reserva-
238 tion, and to select and relocate the same in the manner provided by the said act of June 21, 1860, at any time before June 21, 1865.

In view of the fact that the tract located by Mr. Watts under the amended petition is known to contain minerals and that it is settled upon by a large number of persons engaged in mining and other industries. I think there is no valid reason why an application by the heirs of Baca or their legal representatives to relocate the tract in question should not be granted in the same manner as in the case of the tract on the Pecos river, above referred to.

The said letter of the Hon. P. B. Plumb with its enclosure is herewith returned.

I have the honor to be

Very respectfully,

Your obedient servant,

N. C. McFARLAND,
Commissioner.

239 DEFENDANTS' EXHIBIT No. 22.

Counsel for defendants offer in evidence an original printed copy of S. 79, 48th Congress, 2nd session, on file in the General Land Office, referred to on page 32 of the answer, and mark the same "Defendants' Exhibit No. 22."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 22, on the ground that it is incompetent, irrelevant and immaterial, for the reason that it never became a law; for the further reason that it is not evidence of the facts therein stated; and for the further reason that the statement therein "which one-fifth has not yet been located" is not shown to be the admission of John C. Robinson, or anyone in the plaintiffs' line of title.

240 48th Congress, 2d Session. Calendar No. 1064.

S. 79.

(Report No. 1063.) D.

In the Senate of the United States.

December 4, 1883.

Mr. Miller, of New York (by request), asked and, by unanimous consent, obtained leave to bring in the following bill; which was read twice and referred to the Committee on Private Land Claims.

January 23, 1885.

Reported by Mr. Manderson adversely.

A Bill to Amend an Act Entitled "An Act to Confirm Certain Private Land-claims in the Territory of New Mexico.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed to cause to be issued to John C. Robinson, his heirs and assigns, said John C. Robinson being the grantee and assignee of the heirs of Luis Maria Baca, their legal representatives and assigns, public-land scrip
241 to the extent and in lieu of the one-fifth of the grant of land provided for in the act of Congress approved June twenty-first, eighteen hundred and sixty, entitled "An act to confirm certain private land-claims in the Territory of New Mexico," which one-fifth has not yet been located, without reference to the limitation of time prescribed in said act; said scrip to be issued in amounts conformable to the practice of the General Land Office, and to be located upon any of the public lands unoccupied and not mineral, within the Territories of New Mexico or Arizona, or elsewhere.

SEC. 2. That it is expressly understood and provided that the land scrip authorized to be issued by the first section of this act is to be accepted by the said John C. Robinson, his heirs and assigns, in lieu and in the stead of any and of all of the benefits and privileges as to the one-fifth aforesaid whatsoever granted or confirmed in the act of June twenty-first, eighteen hundred and sixty; and any authority for selection, location, or relocation of said fifth granted in said act is hereby declared void and of no effect: Provided, That the said John C. Robinson, his heirs and assigns, shall avail themselves of the rights and privileges conveyed by this act within five years from the date of the passage thereof, and in the event of their failure so to do said rights and privileges shall become void and of no effect.

242 (Endorsed:) Calendar No. 1964. 48th Congress, 2d Session. S. 79. (Report No. 1063.) A bill to amend an act entitled "An act to confirm certain private land-claims in the Territory of New Mexico." 1883—December 4.—Read twice and referred to the Committee on Private Land Claims. 1885—January 23.—Reported adversely.

243 DEFENDANTS' EXHIBIT No. 23.

Counsel for defendants offer in evidence original printed copy of a document entitled: "Senate Bill No. 79. A Bill To amend an act entitled 'An Act to confirm certain private land claims in the Territory of New Mexico'"; signed by Chas. A. Eldredge and William W. Belknap, the same being from the files of the General Land Office, and referred to on page 32 of the answer, and mark the same "Defendants' Exhibit No. 23."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 23, on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is not evidence of the facts therein stated, being merely a brief presented to Congress by certain attorneys and has no probative force, and said attorneys are not shown to have had authority to make the admissions purporting to be made therein.

244 Senate Bill No. 79.

A Bill to Amend an Act Entitled "An Act to Confirm Certain Private Land Claims in the Territory of New Mexico."

Statement of the Case.

I.

By the terms of the Treaty of Guadalupe Hidalgo and what is called the Gadsden purchase between the United States and Mexico, all that territory known as New Mexico, formerly belonging to Mexico, was ceded to the United States.

In accordance with the terms of that Treaty, the act of Congress approved June 21, 1860, was passed, by which the heirs of Louis Maria Baca were authorized to select 500,000 acres of non-mineral land in the Territory of New Mexico, provided the right granted should be in force only for three years from June 21, 1860.

II.

On June 17th, 1863, John S. Watts, attorney for the heirs of Baca, notified the Surveyor-General of New Mexico that a certain tract of land situated near the base of the Solero mountain, in the vicinity of Tubac, had been selected as one of the five tracts con-
245 firmed to said heirs. This location was approved by the Surveyor-General and transmitted to the General Land Office, and on April 9, 1864, the Surveyor-General of Arizona was instructed to have said location surveyed.

III.

On May 1, 1864, the heirs of Baca conveyed to John S. Watts their interest, which comprised the tract above mentioned, known as location No. 3.

IV.

On April 30, 1866, John S. Watts filed an amended description of the aforesaid selection, which was also approved by the Surveyor-General, and forwarded to the General Land Office to have the survey conform to the amended description. The survey was never made and could not be made, as claimant contends, on account of the hostility of the Indians.

V.

On January 8, 1870, John S. Watts sold to Christopher E. Hawley the location described in No. IV as comprising the Baca grant,

intending to convey the interest of Baca's heirs, which interest had been conveyed to him. But he described it as it was described in the application for the new location, and not by the metes and bounds of the tract as given in the conveyance to him.

VI.

246 On January 13, 1870, Hawley executed a power of attorney to James Eldredge, authorizing him to sell the property described in the conveyance made by Watts to him, (Hawley).

VII.

On July 7, 1879, James Eldredge conveyed said property to John C. Robinson, of New York, the present claimant. A certified copy of the deed from Baca's heirs to Watts, as recorded in New Mexico, and the originals of the deed from Watts to Hawley, of the power of attorney from Hawley to Eldredge, and the deed from Eldredge to Robinson, are in the possession of the claimant.

VIII.

Baca's heirs, in conveying to Watts, intended to convey their entire interest in "Location, No. 3," by which name their interest was known, and did convey the same; and Watts, in conveying to Hawley, intended to convey and did convey the same interest.

IX.

While the descriptions do not correspond, still they are sufficient to operate as an equitable assignment, as they were intended to be, of the right of the Bacas to 100,000 acres of land secured to them by the Treaty.

X.

On June 11, 1864, the heirs of Baca, after the three years prescribed in the original act of June 21, 1860, had expired,
247 received authority by act of Congress (Statutes 13, page 125) to select and relocate another one of these tracts of 100,000 acres, (one-fifth of the original grant,) and additional time was given them for that purpose. This was a tract on the Pecos river.

The Commissioner of the General Land Office says, in a communication to the Secretary of the Interior concerning the case now before the committee, which letter is now on file with the Committee on Private Land Claims of the Senate: "I think there is no rea-
" son why an application by the heirs of Baca, or by their legal rep-
" resentatives, to relocate the tract in question, should not be granted
" in the same manner as in the case of the tract on the Pecos river
" above referred to."

XI.

Senate bill No. 79, now before the Committee on Private Land claims in the Senate, "to amend an act entitled 'An act to confirm
" certain private land claims in the Territory of New Mexico,'" au-

thorizes the issue to John C. Robinson of public land scrip in lieu of the one-fifth of the original grant of land to Baca, which scrip could be located on any of the public lands unoccupied and non-mineral.

CHAS. A. ELDREDGE,
WM. W. BELKNAP,
Attorneys for Claimant.

29*b*. Baca No. 3.

248 DEFENDANTS' EXHIBIT No. 24.

Counsel for defendants offer in evidence duly certified copy of the official press-copy in the files of the General Land Office of a letter dated February 14, 1884, from the Commissioner of the General Land Office to the Secretary of the Interior, referred to on page 32 of the answer, and mark the same "Defendants' Exhibit No. 24."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 24, on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a copy of a copy of a letter, and no foundation has been laid for the introduction thereof; for the further reason that it is not evidence of the facts therein stated; for the further reason that the opinion of a Commissioner of the General Land Office and his suggestions with regard to a bill pending before Congress have no evidential value; and for the further reason that it assumes that the claimants were required, by the act of June 2, 1862, to pay the costs of survey.

249 "B." DEPARTMENT OF THE INTERIOR,
M. E. L. GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 22, 1910.

I hereby certify that the annexed copy of office letter dated Feb'y 14, 1884, is a true and literal exemplification of the press copy of said letter in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

250 A. DEPARTMENT OF THE INTERIOR, W. H. W.
GENERAL LAND OFFICE, J. B. L.
WASHINGTON, D. C., *Feb'y* 14, 1884.

Hon. H. M. Teller, Secretary of the Interior.

SIR: On the 28th ultimo, the Hon. Assistant Secretary, referred here for report S. 79, entitled, "A Bill to amend an Act entitled 'An Act to confirm certain private land claims in the Territory of New Mexico,'" transmitted to you on the 26th ult. by Hon. T. F. Bayard, Chairman of the Committee on Private Land Claims, United States Senate.

An expression of my views upon the — Bill is requested, principally in relation to the deviation of the title to certain tracts of land, known as "Baca locations," hereinafter described.

In response to the inquiry "whether the title under which tracts Nos. 2 and 4 of the grant to the heirs of Luis Maria Baca are now held, is derived from the deed of said heirs to John S. Watts, dated May 1st, 1864, or if not how the same is derived, "I have to state that these locations appear on the records of this office in the name of the heirs of Luis Maria Baca; and there is no evidence on file here that said heirs ever conveyed their interest to any other person.

In reply to the other inquiries I have to state, that a copy
251 of the papers before Congress at the date of confirmation of the claim of Baca,—June 21, 1860,—will be found printed in H. R. Ex. Doc. No. 14, 36th Cong. 1st Session, and that John S. Watts was never Surveyor General for the Territory of New Mexico.

That said Senate Bill 79, directs that the Secretary of the Interior cause to be issued to John C. Robinson, his heirs and assigns, public land scrip to the extent and in lieu of one fifth of the grant of land provided for in the 6th Sect. of the Act of Congress approved June 21, 1860, and to be located upon any of the public lands, unoccupied and not mineral, within the Territory of New Mexico, Arizona, or elsewhere.

The 6th Section of the Act of Congress approved June 21, 1860,—Stats. Vol. 12, p. 72,—provided that it should be lawful for the heirs of Luis Maria Baca who made claim to the tract of land claimed by the town of Las Vegas, to select, instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico; to be located by them in square bodies, not exceeding five in number, and that it should be the duty of the Surveyor General of New Mexico to make survey and location of the lands so selected by the said heirs of Baca, when thereunto required by them. It was provided, however, that the right thereby granted to the said heirs of Baca should continue in force during three years from the passage of the Act, and no longer.

Upon a survey of the claim of the town of Las Vegas, it
252 was ascertained that it contained an area of 496,446.96 acres, therefore the heirs of Baca were, under said Act, entitled to make five locations of 99,289.392 acres, each. Four locations have been made, and approved; one in Arizona, one in Colorado, and two in New Mexico; all in the name of the heirs of said Luis Maria Baca.

Under date of June 17, 1863, Mr. John S. Watts, Attorney for the heirs of Luis Maria Baca, made application to locate one tract, and said application was approved as tract No. 3, by the Surveyor General of New Mexico, on the same date.

Subsequently, on April 30, 1866, Mr. Watts filed an amended application; and on May 21, 1866, instructions were given by this office to the Surveyor General, to make the survey according to the amended application.

The Survey was not made: primarily because Mr. Watts failed to deposit the sum estimated as necessary to pay the expenses of the survey as required by the Act of June 2, 1862, Stats. Vol. 12, p. 471;

and latterly, after repeal of said Act of June 2, 1862, by the Act of Feb'y 28, 1871, Stats. 16, p. 416, for the reason that large mineral deposits had been discovered on the tract located.

On Aug. 15, 1877, John *H.* Watts, claiming to be Attorney for the heirs, and part owner, made application to this office for permission to relocate said tract. This application was denied upon the ground that the proviso to the said Sixth section of the Act of June 21, 1860, limited the right to locate for three years, which period having expired, this office could not authorize a relocation
253 without special legislation by Congress.

In the opinion of this office, this view is sustained by the Act of Congress approved June 17, 1864, Stats. Vol. 13, p. 125, by which the heirs of Luis Maria Baca were authorized to withdraw the location theretofore made by them on the Pecos river, and adjoining the Fort Sumner reservation, and to select and relocate the same in the manner provided by the said Act of June 21, 1860, at any time before June 21, 1865.

I deem it my duty to say in this connection, that there seems to be no sufficient reason for enlarging the Territory out of which this claim is to be satisfied, but that it should be confined to what was, at the date (June 21, 1860) of the confirmation of said claim, the Territory of New Mexico.

As there is no evidence on file here showing the right of John C. Robinson to locate the one fifth part of said claim, I cannot recommend any Bill for his individual relief; but would suggest that it be in favor of the heirs of Luis Maria Baca, their heirs and assigns.

The said Bill authorizes the issue of scrip which can "be located upon any of the public lands, unoccupied and not mineral, within the Territories of New Mexico or Arizona, or elsewhere."

In recommendations by this office, in similar cases, the rule has been to confine the locations of scrip to "offered," non-mineral lands, subject to sale at the minimum price of one dollar and
254 twenty-five cents per acre. There being but a limited quantity of "offered" land in the present Territory of New Mexico, none in the Territory of Arizona, and very little in that part of the State of Colorado which was once included in the Territory of New Mexico, I respectfully suggest the following amendments to said Bill.

In section 1, line 4, after the words "issued to," strike out all following to the words,—"the heirs of Luis Maria Baca;" so that it will read,—"issued to the heirs of Luis Maria Baca."

In line 7 strike out "legal representatives," and insert "heirs," in lieu thereof,—

In line 8 insert in parenthesis after the word "one-fifth" ("or ninety-nine thousand, two hundred and eighty-nine acres, and three thousand and ninety-two thousandths of an acre;")

In line 15, after the word "the," insert the word "vacant."

In line 16, strike out the words "unoccupied and."

In line 16, after the word "mineral," strike out "within the Territories of New Mexico or Arizona or elsewhere," and insert,—"subject to entry, at the minimum valuation of one dollar and twenty-

five cents per acre, according to the legal subdivisions of the public surveys made by the United States, within what was on the twenty-first day of June, one thousand eight hundred and sixty, the Territory of New Mexico."

In Section 2, line 3, after the word "said," strike out
255 "John C. Robinson his," and insert "the heirs of Luis Maria Baca their."

In line 10, after the word "said" strike out "John C. Robinson his," and insert "the heirs of Luis Maria Baca their."

I would also respectfully suggest that a third section be added to the Bill as follows, viz:

SECTION 3. That the register of the proper land office, upon any such scrip being located, shall issue, in the name of the party making the location, a certificate of entry; upon which, if it shall appear to the satisfaction of the Commissioner of the General Land Office that such certificate has been fairly obtained, according to the true intent and meaning of this Act, a patent shall issue, as in other cases, in the name of the locator, his heirs and assigns.

The letter and Bill are, herewith, returned.

Very respectfully,

Your obt. servant. N. C. McFARLAND,
Commissioner.

256 DEFENDANTS' EXHIBIT No. 25.

Counsel for defendants offer in evidence duly certified copy of the press-copy on file in the General Land Office of a letter dated May 16, 1884, from the Commissioner of the General Land Office to Hon. Thomas F. Bayard, together with copy of the accompanying diagram referred to in said letter, and mark the same "Defendants' Exhibit No. 25."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 25, on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a copy of a copy, and no foundation has been laid for the introduction of such a paper; for the further reason that it purports to enclose certain papers which do not appear therewith; for the further reason that it is not evidence of the facts therein stated; for the further reason that it purports to recognize the unauthorized relocation of 1866; and for the further reason that it apparently holds that the claimants were required, by the act of June 2, 1862, to make a deposit of the costs of survey.

257 "B." DEPARTMENT OF THE INTERIOR,
M. E. L. GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 22, 1910.

I hereby certify that the annexed copy of office letter dated May 16, 1884, and tracing of diagram, are true and literal exemplifications of the press copy of said letter and the original accompanying diagram in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

258 Special.

L. H. J. E. O. H.

E. DEPARTMENT OF THE INTERIOR,
47836 GENERAL LAND OFFICE,
WASHINGTON, D. C., *May 16th*, 1884.
1884

Hon. Thomas F. Bayard, Chairman Com. on Private Land Claims, U. S. Senate.

SIR: I have the honor to acknowledge the receipt of a letter addressed to this office by Mr. Henry L. Bryan, Clerk of the Senate Committee on Private Land Claims, dated 5th instant, requesting copy of the original application for "Tract No. 3" of the Baca locations, made October 30, 1862; letter of the Commissioner of the General Land Office in relation thereto dated February 5, 1863; copy of the amended application made April 30, 1866, with instructions issued by the Department thereunder dated May 21, 1866, copy of letter of Mr. Watts, dated August 15, 1877, applying for permission to relocate the Tract No. 3 and such other correspondence as may be on file in this office relative to the location of said tract.

Also a statement of the number of quarter-sections of lands embraced in the location selected by Mr. Watts June 17, 1863, that have been patented to other persons, when patented and to whom and whether this office has cognizance of the existence of such Indian troubles in the locality of this selection as would prevent
259 the survey of the tract, and if so, the duration thereof.

In reply I have the honor to inclose herewith copies of the following described papers pertaining to said Baca location No. 3, to-wit:—

A. Letter from the Surveyor General of New Mexico dated November 8, 1862, transmitting copy of the application of the heirs of Luis Maria Cabeza de Baca to locate Baca Tract No. 3, at the "Bosque Redondo" on the Pecos River, New Mexico—two inclosures.

B. Letter from Hon. J. S. Watts, dated Jan'y 18, 1863, requesting permission to withdraw the location asked for at the "Bosque Redondo."

C. Letter from the Commissioner of the General Land Office to the Surveyor General of New Mexico, dated February 5, 1863, stating that John S. Watts has filed application, dated January 18, 1863, for withdrawal of his application dated October 30, 1862, for location of one of the five tracts granted to the heirs of Don Luis Maria Cabeza de Baca. Request granted.

D. Letter from the Surveyor General of New Mexico, dated June

18, 1863, inclosing the application and certificate of location No. 3, of the claim confirmed to the heirs of Luis Maria Cabeza de Baca.

E. Letter from the Commissioner of the General Land Office to the Surveyor General of New Mexico, dated July 18, 1863, calling for statement showing that the land embraced in Baca location No. 3, is vacant and non-mineral.

260 F. Letter from John S. Watts, dated March 27, 1864, inclosing a certificate of the Register at Santa Fe, in reference to a location for the heirs of Luis Maria Cabeza de Baca.

G. Letter from the Surveyor General of New Mexico, dated April 2, 1864, in reply to Commissioner's letter of July 18, 1863, relating to Baca location No. 3.

H. Letter from the Commissioner of the General Land Office to the Surveyor General of Arizona, dated April 9, 1864, giving instructions in regard to the survey of Baca location No. 3, according to location approved by the Surveyor General of New Mexico, dated June 18, 1863.

I. Letter from the Commissioner of the General Land Office to the Surveyor General of New Mexico, dated September 17, 1864, instructing him to survey Baca Location No. 3, in accordance with instructions given to the Surveyor General of Arizona, April 9, 1864.

K. Letter from John S. Watts, Att'y for heirs of Don Luis Maria Cabeza de Baca, amended application (and diagram) for the location of one fifth of the Baca Grant at Salero Mountain in Arizona, dated April 30, 1866.

L. Letter from the Commissioner of the General Land Office to the Surveyor General of New Mexico, dated May 21, 1866, directing a survey of Baca Location No. 3, in accordance with Judge Watts' amended application of April 30, 1866.

M. Letter from the Surveyor General of New Mexico, dated June 1, 1866, in reply to Commissioner's letter of May 21, 1866, relative to the survey of Baca Location No. 3.

261 N. Letter from the Commissioner of the General Land Office to John S. Watts, dated July 2, 1866, directing deposit of $900 for the survey of Baca location No. 3.

O. Letter from John H. Watts to the Commissioner of the General Land Office, dated August 15, 1877, requesting permission to relocate Baca Float No. 3, which was located by his Father on land supposed to be vacant and non-mineral but now supposed to be mineral.

P. Diagram constructed in this office showing as nearly as can be approximated, from the best data obtainable, the locations of Baca Claim No. 3, according to applications of June 17, 1863, and April 30, 1866.

Owing to lack of information as to the location of the highest point of "Salerno Mountain" it is impracticable to show, with any degree of accuracy, the land covered by the application of June 17, 1863. Upon the copy of the diagram accompanying Mr. Watts' application of April 30, 1866 (the original was sent to the Surveyor

General of New Mexico) there is a note made in this office to the effect that the southeast corner of the tract shown on said diagram is the beginning point of the location of June 17, 1863, but there is nothing else of record tending to show that such is the case and taking the ascertained position of Salerno Mountain into consideration, it is impossible to reconcile this point as the true beginning point of the location of June 17, 1863.

It does not appear from the record that any lands have been patented within the limits of the Location of June 17, 1863, as shown upon diagram "P."

262 Within the location of April 30, 1866, but two quarter-sections of land have been patented, viz:—

Northeast quarter Section 9, Township 21 South, Range 16 East—160 acres—patented to Thomas Hughes, Sept. 1, 1880, and East half, Northeast quarter and East half Southeast quarter Section 29, Township 21 South, Range 16 East—160 acres—patented to Daniel W. Lyon, October 19, 1883.

There are a number of mining claims in the two Mining Districts shown on Diagram "P." but the public land surveys not having been extended over these Districts the location of the claims cannot be shown, but some of them may fall within the Baca locations as represented.

This office has no information in regard to Indian hostilities in the vicinity of the said Baca locations other than that afforded by the papers herewith.

I have the honor to be,

Very respectfully, your ob't serv't,

N. C. McFARLAND,
Commissioner.

(Here follows drawing marked p. 263.)

264 DEFENDANTS' EXHIBIT No. 26.

Counsel for defendants offer in evidence duly certified copy of the original of a letter on file in the General Land Office, dated February 13, 1885, from John C. Robinson to the Commissioner of the General Land Office, referred to on pages 33-34 of the answer, and mark the same "Defendants' Exhibit No. 26."

Counsel for plaintiffs object to the admission of defendants' proposed Exhibit No. 26, on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is not evidence of the facts therein stated; and for the further reason that it does not purport to deal with the selection of June 17, 1863.

265 DEFENDANTS' EXHIBIT No. 27.

Counsel for defendants offer in evidence duly certified copy of letter of instructions exemplified from the record of said letter in the General Land Office, dated March 12, 1885, from the Commissioner of the General Land Office to the United States Surveyor-General for New Mexico, and mark the same "Defendants' Exhibit No. 27."

Counsel for plaintiffs object to the admission of defendants' proposed Exhibit No. 27 (except in so far as it may contain admissions against interest on the part of defendants and in favor of plaintiffs), on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a decision of the acting Commissioner of the General Land Office, which is reported in Land Decisions, and should not be admitted as evidence; for the further reason that it is a copy of a copy, and no foundation has been laid for the admission of such a paper; for the further reason that it is not evidence of the facts therein stated; for the further reason that it assumes that the claimants were required to pay the expenses of the survey, under the act of June 2, 1862; and for the further reason that it is dated March 12, 1885, whereas title vested in the heirs of Baca April 9, 1864, and the jurisdiction of the Land Department then ceased.

266 DEFENDANTS' EXHIBIT No. 28.

Counsel for defendants offer in evidence duly certified copy of the record copy of a letter on file in the General Land Office, dated July 13, 1886, from the Commissioner of the General Land Office to Samuel S. Smoot, and mark the same "Defendants' Exhibit No. 28."

Counsel for plaintiffs object to the admission of defendants' proposed Exhibit No. 28 (except in so far as it may contain admissions against interest on the part of defendants and in favor of plaintiffs), on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a copy of a copy, and no foundation has been laid for the introduction of such a paper; for the further reason that it purports to be a copy of a decision of the Commissioner of the General Land Office, which is reported in Land Decisions, and should not be admitted as evidence; for the further reason that it is not evidence of the facts therein stated; and for the further reason that it is dated July 13, 1886, whereas title vested in the heirs of Baca April 9, 1864, and the jurisdiction of the Land Department then ceased.

267 "B."
M. E. L.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.
WASHINGTON, D. C., *November* 23, 1910.

I hereby certify that the annexed copy of office letter dated July 13, 1886, is a true and literal exemplification from the record of said letter in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

268 **Exd.**

DEPARTMENT OF THE INTERIOR,
J. W. L. GENERAL LAND OFFICE,
WASHINGTON, D. C., *July* 13, 1886.

Samuel S. Smoot, Esq., 1423 K St., Washington, D. C.

SIR: In reply to your inquiry whether a relocation of the private land claim known as "Baca float No. 3," in the Territory of New Mexico, can now be made, I have to advise you of my opinion as follows:

The act of June 21, 1860, (12 Stat. 72) authorized the Baca heirs to select in lieu of the land claimed by them which was also claimed by the Town of Las Vegas, a quantity of land equal to the quantity so claimed.

This act did not require nor does it appear to imply, that the Baca heirs should receive title to an amount equal to the amount embraced in the Las Vegas claim but it appears simply to have allowed a selection of that quantity thus giving them the same status and placing them in exactly the same position in respect of the alternative lands that they would have occupied in respect to the original lands.

The fate of their selection, in respect of quantity must therefore, it would reasonably appear, depend upon the quantity ultimately awarded to the town of Las Vegas.

The act was in the nature of a compromise of conflicting claims. Congress intended to give the Baca heirs as much land elsewhere as they would have been entitled to, if their claim to the lands em-
braced in the Las Vegas grant should have prevailed. It is
269 not to be presumed that Congress intended to give them any more. It did not follow that the entire area claimed under the Las Vegas grant, would ultimately be allowed. There was therefore a necessary limitation upon the amount to which the Baca heirs could receive a final adjudication.

The Las Vegas claim has not been finally adjudicated, and it is by no means certain that the amount claimed is not largely in excess of any amount to which the town could legally be entitled.

The Baca heirs have already had locations made, which appear to have been treated as final, to the amount of nearly 400,000 acres. If the Las Vegas grant should be found to be less in quantity than this amount, it would be a question whether all rights of the Baca heirs had not already been satisfied. If they have been so satisfied, of course a further location would not be within the spirit of the law, notwithstanding the fact that the whole amount, or more than the whole amount to which they were entitled, had been taken in four bodies instead of five as prescribed by the statute.

But a more immediate question is presented by your inquiry. It is whether all rights to make any selection under the act of June 21, 1860, have not ceased by operation of law.

It was provided by said act "that the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act and no longer."

The records of this office disclose the fact that they did make a selection within the time specified, but that they failed to
270 make a deposit for the expenses of survey, and, accordingly, that survey and location were not made. The act of June 2, 1862, (12 Stat. 410), which was prior to the act under which the Baca heirs claim, provided that before any private land claim should be surveyed the cost of making the survey should be paid or secured by the grant claimants.

The time within which a survey and location should be made under the act of June 21, 1860, was not limited. Probably the Surveyor General might have executed the survey after the expiration of three years, if a deposit had been made within a proper time, but it appears that not only was no deposit made within the time to which the rights of the Baca heirs were to be executed, if at all, but that such deposit was never made.

The selection therefore failed to become effective and such failure was the fault of the grant claimants themselves, being the result of their own laches. It further appears that the original selection was abandoned by the grant claimants, who, in 1866, made a second selection which was authorized by this office to be surveyed.

In 1877 another application for relocation was made which was denied upon the ground that the right of selection had been forfeited under the limitations of the act.

On Feb'y 13, 1885, application was again made for a relocation of the claim, and on March 12, 1885, the Acting Commissioner of this office formally rejected the location made under the
271 selection of 1866, on the ground that, as represented by the grant claimants, the land was mineral in character, and advised the Surveyor General that a new selection could be made.

I do not concur in that opinion, since it appears that the right of relocation expired in 1863, and I do not think it competent for this office to extend the act of Congress, nor that the various acts and proceedings of this office calculated to accomplish that result can be regarded as legally effective to any such end.

I am therefore of the opinion that I have no authority to allow a relocation of said claim at this time.

The enclosures with your letter are herewith returned.

Very respectfully,

WM. A. J. SPARKS,
Commissioner.

272 DEFENDANTS' EXHIBIT No. 29.

Counsel for defendants offer in evidence duly certified copy of a letter on file in the General Land Office, dated June 15, 1887, from the Secretary of the Interior to the Commissioner of the General Land Office, and mark the same "Defendants' Exhibit No. 29."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 29 (except in so far as it may contain admissions against interest on the part of defendants and in favor of the plaintiffs), on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a copy of a copy, and no foundation has been laid for the admission of such a paper; for the further reason that it purports to be a copy of a decision of the Secretary of the Interior, which is reported in Land Decisions, and is not admissible in evidence; for the further reason that it is not evidence of the facts therein stated; and for the further reason that it is dated June 15, 1887, whereas title vested in the heirs of Baca April 9, 1864, and the jurisdiction of the Land Department over said land then ceased.

273 "B." DEPARTMENT OF THE INTERIOR,
M. E. L. GENERAL LAND OFFICE,

WASHINGTON, D. C., *November* 23, 1910.

I hereby certify that the annexed copy of letter dated June 15, 1887, is a true and literal exemplification of the original in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

274 D.

5601-1886. DEPARTMENT OF THE INTERIOR, E. F. B.
2828-1887. WASHINGTON, *June* 15, 1887.

The Commissioner of the General Land Office.

SIR: On August 12 last I heard Mr. John C. Robinson, through his counsel, protesting against your views relative to the right to relocate Baca Float No. 3, and asking that your views and opinions be annulled, and that the order of Acting Commissioner Harrison of March 12, 1885, be declared legal and final.

The action complained of appeared to be a mere expression of opinion, and as no official action had been taken by you relative to the right to relocate the claim under the decision of March 12, 1885, there was nothing before me to act upon and hence the application was denied.

This matter is again brought to my attention by the enclosed communication of Mr. W. G. Rifenburg, submitting the question whether said land can be relocated.

By the 6th section of the act of Congress of June 21, 1860, Stat. 12, p. 72, it is provided—

"That it shall be lawful for the heirs of Louis Maria Baca, who make claim to the said tract of land as is claimed by the town of

Las Begas, (Vegas,) to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. And it shall be the duty of the Surveyor General
275 of New Mexico to make survey and location of the lands so selected by said heirs of Baca when hereunto required by them; Provided, however, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer."

By reference to the act it will be seen that selections were to be made in the Territory of New Mexico in square bodies, not exceeding five in number. In accordance therewith, five selections were made—known as Baca Claim Numbers 1, 2, 3, 4 and 5, respectively. It was ascertained that the quantity of land claimed by the town of Las Vegas was 496,446.96 acres, and therefore each location embraced 99,289.39 acres.

The tract designated as claim No. 3 was selected and located by John S. Watts, attorney for the Baca heirs, June 17, 1863, and was approved by the Surveyor General of New Mexico on same day, but was not surveyed because claimants failed to make the necessary deposit to pay for expense of survey. On April 30, 1866, claimants filed an amended application for selection and location of claim No. 3, and on May 21, 1866, your office issued instructions for survey thereof as amended. By decision of your office of September 27, 1877, upon the application of J. H. Watts, attorney for claimants, to relocate this claim, the application was rejected, upon the ground that your office could not authorize a relocation and selection of said claim after the expiration of the time limited by Congress.

February 13, 1885, John C. Robinson filed in your office his application as owner to relocate Baca claim No. 3, alleging that
276 the present selection of this claim is upon lands mineral in character. Upon this application Acting Commissioner Harrison, by decision of March 12, 1885, held: "The present location of the claim is therefore rejected, for the reason that the lands embraced are mineral in character, and not subject to selection and location under the act, and a reselection and location is hereby allowed."

It will be observed that the present location of this claim was not rejected upon any application or claim of the government, but in accordance with the application and request of the grant claimants and upon their allegation of the fact that the land is mineral.

A similar question came before your office on the application of William Gilpin for patent to Baca claim No. 4. In that case it was claimed by the government that the land was mineral, and that the Surveyor General approved the plat of survey, subject to the conditions and provisions of the act of June 21, 1860. Commissioner Williamson, however, held that, "The Surveyor General did not undertake and had no power to impose conditions not in the act," and that "The question as to the mineral or non-mineral character of this land has been passed upon by competent authority, the

title has passed from the government and vested in private individuals, this office has no authority to reopen the question, the land can no longer be regarded as part of the public domain."

In the case above referred to, it was urged by the government that the mineral character of the land was sufficient to invalidate
277 the selection and location. In the application to relocate claim No. 3, the claimant alleges the mineral character of the land as a reason why he should be allowed to relocate the claim, no objection to the character of the land being made by the government. The ruling of Commissioner Williamson upon the application to relocate claim No. 4 is applicable to this case and should have controlled.

The act of June 21, 1860, authorizing claimant to select and locate vacant land not mineral in the Territory of New Mexico, in lieu of land claimed by the town of Las Vegas, provided that said right "shall continue in force during three years from the passage of this Act, and no longer."

Here is an express limitation of the right to make selection and location. If claimants failed to make selection and location (and by location is meant the designation by approximate boundaries of a specific tract) on or prior to June 23, 1863; there is no power or authority in the Department to remove the bar and to authorize a selection and location thereafter.

So, on the other hand, if selection and location of this claim has been made prior to June 21, 1863, of lands not mineral, or not known to be mineral, agreeable to the provisions of said act, there is no power or authority in the department to cancel such selection and allow a relocation of said claim. It is true that if claimants made selection and location of lands known to be mineral, such selection and location could be vacated, and the right to select other land in lieu thereof would be barred, unless made within the
278 time limited by the act.

For the reason above stated, the action of Commissioner Harrison of March 12, 1885, was without authority and therefore void.

It is conceded that a selection was made, the location designated and approved by the Surveyor General June 17, 1863, agreeable to the provisions of the act. It appears that this selection was amended upon application made therefor April 30, 1866, so as to correct what was alleged to be a mistake in defining the location, and that instruction for the survey of the location as amended was issued by your office May 21, 1866.

The claimant must be held to this selection and location, and can not be allowed to relocate other land in lieu of it.

If, however, the government has disposed of any part of the lands embraced in said location, by reason of the action of your office of March 12, 1885, claimants perhaps might in that event upon a proper application made be allowed to select and locate other land in lieu of such lands as may have been so disposed of by the govern-

ment; but as no such facts appear, and no application has been made to your office for that purpose, I decline to pass upon that question.

Very respectfully,

L. L. C. LAMAR, *Secretary.*

279 DEFENDANTS' EXHIBIT No. 30.

Counsel for defendants offer in evidence certified copy from the record of a letter in the files of the General Land Office, dated March 5, 1889, from the Commissioner of the General Land Office to the Surveyor-General of Arizona, and mark the same "Defendants' Exhibit No. 30."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 30 (except as it may contain admissions against interest on the part of defendants and in favor of plaintiffs), on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a copy of a copy, and no foundation has been laid for the introduction of such a paper; for the further reason that it purports to be a copy of a letter of the Commissioner of the General Land Office to the Surveyor General of Arizona; for the further reason that it is not evidence of the facts therein stated; and for the further reason that it is dated March 5, 1889, whereas title vested in the heirs of Baca April 9, 1864, and the jurisdiction of the Land Department over said land then ceased.

280 "B." DEPARTMENT OF THE INTERIOR.
M. E. L. GENERAL LAND OFFICE.
WASHINGTON, D. C., *November* 23, 1910.

I hereby certify that the annexed copy of office letter dated March 5, 1889, is a true and literal exemplification from the record of said letter in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

281 L. D. L. DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.
WASHINGTON, D. C., *March* 5, 1889.

John Hise, Esq., Surveyor General, Tucson, Arizona.

SIR: I am in receipt of an application by John C. Robinson, who claims to be the assignee of the claim covered by the selection under "Baca Float, No. 3," asking that a survey be directed of the lands selected in 1863, as amended in 1866, under the sixth section of the act of June 21, 1860 (12 Stat. 72,) to confirm certain private land grants in the Territory of New Mexico. Mr. Robinson says: "A deposit will be made to pay the expenses of the survey." Also, application to the same effect of Feb. 23, 1889, by P. P. Thompson, Jr. and Hon. J. E. McDonald, for claimants.

From the records and files of this office it appears that a survey of the lands selected as the third of the five tracts which the heirs of Louis Maria Baca were authorized by said act to select, was ordered by this office, but no record of any such survey appears. By my letter "D," of September 29, 1887, I transmitted to you a copy of the opinion of Hon. Secretary Lamar, wherein he held that the action of Acting Commissioner Harrison, on March 12, 1885, in allowing a re-selection and location of claim No. 3, "was without authority and therefore void." The Secretary in said de-
282 cision says; after quoting said section 6. "If claimants failed to make selections and locations, (and by location is meant the designation by approximate boundaries of a specific tract) on or prior to June 23, 1863, there is no power or authority in the Department to remove the bar and authorize a selection and location thereafter. So on the other hand, if selection and location of this claim has been made prior to June 21, 1863, of lands not mineral, or not known to be mineral, agreeable to the provisions of said act, there is no power or authority in the Department to cancel such selection and allow a relocation of said claim. It is true if claimants made selection and location of lands known to be mineral, such selection and location could be vacated, and the right to select other lands in lieu thereof would be barred, unless made within the time limited by the Act."

It will thus be seen that the question of the mineral or non-mineral character of the lands is one of first importance. The fact that this selection was made of lands in what is now the richest silver producing region in Arizona, would put upon claimant the burden of proving, prior to the approval of such selection, the non-mineral character of the land claimed.

On Nov. 8, 1887, my predecessor in a letter to Hon. M. R. Wise, whose protest against the approval of this location, is on file said: "In reply I have to state that there is abundant testimony already on file in this office, showing the mineral character of land embraced in the claimed location of Baca Float No. 3, and, therefore, a compliance with your request for further investigation is not
283 deemed necessary at present. * * *

It being held by the Secretary, that claimants are bound by this selection and location, they are therefore bound by all the consequences of such selection and location.

They were not authorized to select known mineral lands, and they are charged with notice of the mineral character of said lands, which were known in the neighborhood to be mineral.

The notoriety of mineral character is notice to them. If, then, the lands selected and located by claimants in 1863, as such location was amended in 1866, were notoriously mineral in character, such location was illegal. There has been no adjudication of the mineral character of the location as a whole, and there has been no application for survey, since the Secretary's decision holding claimants bound by that location."

I concur in the view expressed as above, that said location was illegal, if it was made upon land known in the vicinity to be min-

eral at the time of location in 1863, or of amendment of the approximate boundaries in 1866, even though actual knowledge of the mineral character of the land, at the time of location, cannot be brought home to claimants, or to their agent, John S. Watts.

They are conclusively presumed to have known facts which they could have ascertained by ordinary examination or inquiry upon the lands themselves or in their vicinity. This being the case it would be eminently improper for me to take any action
284 which would, in the least tend to adjudicate the question of title, prior to the ascertainment of the character of the land, as to whether it was subject to location or not. In these cases the title passes upon the approval of the survey of the claim by the Surveyor General. No patent is necessary, and, indeed, patent cannot issue in the absence of any statutory provision therefor. (See Comm'r Williamson's decision of Mar. 21, 1879—in Baca Claim No. 4—Land Office Report for 1879, p. 211.)

I find on file in this office, besides the protest of Mr. R. Wise, above referred to, communications from John E. Mayse, of Tucson, Arizona, E. B. Blanchard, Mary E. Spooner, M. S. Coe, Robinson & Co., V. E. Robinson and W. A. Wood, all of Council Bluffs, Iowa, in all of which communications the parties assert claims to certain portions of the tract covered by said location under mineral entries.

The said Mayse distinctly and expressly charges that the original locations of said claim knew, prior to selecting the land, that it embraced old, well known, and long used Mexican silver mines.

If this be true it would indicate fraud in making the location originally. These parties desire an early settlement of the question of title which, in view of its long delay, is certainly desirable. I do not deem a survey necessary to the determination of the question of the character of the land at the time of location, although you may find it so, but there should be an investigation of that matter at as early a date as possible.

I have therefore to direct that you will order a hearing
285 between the mineral claimants and the grant claimants upon the points, (1) as to whether or not the original claimants or their authorized agents or grantees knew, at the time of, or prior to, the selection in 1863, of land under this claim, or at the time, in 1866 of its amendment, of the existence of mines within the out-boundaries of the selection as designated by them in the written selections on file in your office; (2) as to whether, in point of fact, mines did exist within such out-boundaries or any of the lands situated therein were known in the vicinity to be mineral at the time above specified. You will proceed as indicated in Rule 71 of the Rules of Practice now in force, giving the fullest possible opportunity to all parties in interest to present any and all evidence they may deem material. Give notice by registered letter to the parties above named, whose charges are enclosed herein for your assistance and information. You will also notify the grant claimants of the time of said hearing at your office, as follows:

John C. Robinson, by his Attorney, W. E. Belknap of this City, Charles D. Poston, through his Attorney, C. C. Clements of this City,

W. G. Riefenberg of San Diego, Cal., C. R. Holcomb, Phil. B. Thompson, Jr. and Jos. E. McDonald, Att'ys for grant claimants, this city, and all other parties who, from the best information you can obtain, have, or claim any interest in the lands in dispute.

You will proceed strictly according to the rules of practice, rendering your decision after taking all the evidence and hearing argument, and give notice thereof, to all the parties, allowing an appeal therefrom to this office, under rule 44.

286

I enclose the following papers for your use and information, which you will securely keep and return with the record of the hearing to this office.

A. Petition for investigation filed by E. B. Blanchard, et al., of Council Bluffs, Iowa.

B. Letter of John E. Magee of Nov. 12, 1887.

C. Letter dated Sept. 12, 1888, from M. R. Wise.

D. Affidavit of Thomas Gardiner, enclosed in said letter of Wise.

If for the purpose of such hearing and in order to clearly ascertain the exact location of alleged mines with reference to the boundaries of said location, it shall seem to you advisable or necessary to survey the outboundaries of said claim or any part thereof, you will suspend the hearing above provided for, and notify the said Robinson and other grant claimants that they may make a deposit of the funds necessary to pay for such survey, and for the office work necessary thereon, after you shall have made an estimate of the same. You will then cause such survey to be made in the same manner as surveys of private claims are made, the same when made, to be used at the hearing which shall then proceed as above indicated; but you will, on no account, take any action looking to an approval of such survey until the questions arising out of the hearing shall be fully disposed of, and closed in this office and the Department. In other words, such survey as you may cause to be made, under this order, is to be considered only as an aid to, or incident of said hearing, and is not to be made the basis of title to any of the parties hereto, until after the question of the character of the land is first determined.

287

There is another question in connection with this case, to which I desire to call attention. On July 13, 1886, my predecessor, in a letter to Samuel S. Smoot, concerning the claim, said:

"The Act of June 21, 1860—(12 Stat. 72,) authorized the Baca heirs to select, in lieu of the lands claimed by them, which was also claimed by the town of Las Vegas, a quantity of land equal to the quantity as claimed.

This act did not require nor does it appear to imply that the Baca heirs should receive title to an amount equal to the amount embraced in the Las Vegas claim, but it appears simply to have allowed a selection of that quantity, this giving them the same status and placing them in exactly the same position in respect to the alternate lands that they would have occupied in respect to the original lands. The fate of their selection in respect of quantity, must therefore, it would reasonably appear, depend upon the quantity ultimately awarded to the town of Las Vegas.

The Las Vegas grant has not yet been adjudicated. Nothing, therefore, embraced in this letter is to be construed as in any manner calling in question the correctness of the views expressed by Commissioner Sparks, as set out above. Whatever proceedings are had under this order, must be with the distinct understand-
288 ing that the ultimate right of the locators of claim No. 3, to the title of the land embraced in their location, rests upon the confirmation or non-confirmation of the Las Vegas claim to the extent at present claimed by the grantees.

Holding the views expressed herein, of course I cannot concur in the assumption made in said application of February 23, 1889, filed by Messrs. McDonald and Thompson, to the effect that the title to these lands has already passed from the United States and vested in the original grant claimant by virtue of the selection made in 1863, a survey being needed now only to define and set apart what has become "private property." I do not regard this as the effect of Secretary Lamar's decision.

Messrs. McDonald and Thompson's request as well as Mr. Robinson's, that you be instructed to survey said claim, is, therefore denied, except as above indicated.

They will be notified hereof, from this office.

Respectfully, S. M. STOCKSLAGER,
Commissioner."

289 DEFENDANTS' EXHIBIT No. 31.

Counsel for defendants offer in evidence duly certified copy of a decision on file in the General Land Office dated June 24, 1891, signed by the Acting Secretary of the Interior and addressed to the Commissioner of the General Land Office, and mark the same "Defendants' Exhibit No. 31."

Counsel for plaintiffs object to the admission of defendant's proposed Exhibit No. 31 (except in so far as it contains admissions against interest on the part of defendants and in favor of plaintiffs), on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a copy of a copy, and no foundation has been laid for the introduction of such a paper; for the further reason that it purports to be a copy of a decision of an acting Secretary of the Interior Department, which is reported in Land Decisions, and is not admissible in evidence; for the further reason that it is not evidence of the facts therein stated; and for the further reason that it is dated June 24, 1891, whereas title vested in the heirs of Baca April 9, 1864, and the jurisdiction of the Land Department over said land then ceased.

290 "B." DEPARTMENT OF THE INTERIOR,
M. E. L. GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 23, 1910.

I hereby certify that the annexed copy of letter dated June 24, 1891, is a true and literal exemplification of the original in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

291 C. F. L. C.
E. F. B.
G. H. S. DEPARTMENT OF THE INTERIOR, V. B.
WASHINGTON, *June* 24, 1891.
Vol. 12-364.

In the Matter of the Application of JOHN C. ROBINSON, Assignee, for Survey of Baca Float No. 3.

Private Land Claim.

Commissioner of the General Land Office.

SIR: With your letter of July 20, 1889, you transmit the appeal of John C. Robinson, assignee, from the decision of your office denying his application for the survey of the private land claim in the Territory of Arizona, known as Baca Float No. 3.

This claim is one of the five blocks or tracts of land selected and located under the provision of the act of June 21, 1860 (12 Stat., 72), which provides:

"That it shall be lawful for the heirs of Louis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Begas (Vegas), to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. And it shall be the duty of the surveyor general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them; Provided, however, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this
292 act, and no longer."

On July 26, 1860, the Commissioner of the General Land Office called the attention of the surveyor general of New Mexico to the claim of the heirs of Baca, and gave the following direction:

"You will proceed to have the exteriors of the Las Vegas Town claim properly run and connected with the lines of the public surveys. The exact area of the Las Vegas Town tract having been thus ascertained, the right will accrue to the Baca claimants to select a quantity equal to the area of the Town tract elsewhere in New Mexico, of vacant land, not mineral, in square bodies not exceeding five in number. You will furnish them with a certificate, transmitting at the same time a duplicate to this office, of their right, and the area they are to select in five square parcels."

Acting under these instructions the land claimed to be embraced in the grant to the town of Las Vegas was surveyed and found to contain 496,446.96 acres, and on December 8, 1860, the surveyor

general of New Mexico, pursuant to the foregoing instructions, issued to the legal representatives of Baca the following certificate, a duplicate of which was sent to the General Land Office:

"I hereby certify that the grant to the Town of Las Vegas has been surveyed under instructions from this office, and according to the laws of the United States, and that the area of said tract of land is 496,446.96 acres.

Under the act of Congress, approved June 21st, 1860 (See Statutes at large, page 71), the heirs of Luis Maria Baca are entitled to select in not more than five square bodies, the amount of land equal to said area, upon any of the unoccupied lands, not mineral of New Mexico, and the Surveyor General is authorized to survey and locate the same, therefore I notify you that this office is ready to co-operate with you, and receive your application, for the location of
293 the lands granted by the Government."

In accordance therewith, five tracts of land were selected and located, containing in each 99,289.39 acres, and known as Baca Claims numbers 1, 2, 3, 4, and 5, respectively. The tract designated as claim or float number 3 was located by John S. Watts, as attorney for the Baca heirs, on June 17, 1863, which was amended upon application made April 30, 1866, so as to correct an alleged mistake in defining the location, and instructions for the survey of said location as amended were issued by the General Land Office, May 21, 1866, but the survey was not executed, because of the failure of claimant to deposit the necessary funds.

On August 15, 1877, J. H. Watts, one of the heirs of John S. Watts, who became upon his death the owner of Baca claim No. 3, applied to relocate said claim, upon the ground that the first location was made on land supposed to be vacant and non-mineral, but which, as he alleged, was disapproved by the General Land Office, because it contained mineral, or for absence of proof that it was not mineral. This application was rejected by Commissioner Williamson September 20, 1877, upon the ground that the act limits the right of location to three years and no longer, and that the time having expired the General Land Office had no power to authorize a relocation of the claim. He also called attention to the fact that the survey was not executed, because no deposit had been made, but that there was now no obstacle to the execution of the survey of said location.

294 On February 13, 1885, John C. Robinson, who alleged himself to be the assignee of said claim, also applied to relocate this claim, alleging that the claim had been located upon lands mineral in character, and upon this application Acting Commissioner Harrison, March 12, 1885, rejected the present location of the claim, for the reason that it embraced lands mineral in character and allowed a relocation of the same.

The question as to whether this claim can be relocated was afterwards submitted to the Department by said claimants, and on June 15, 1887, the Secretary held that the action of Acting Commissioner Harrison was without authority and void, for the reason that there is no power or authority in the Department to cancel such selection, if made prior to June 21, 1863, upon lands not known

to contain mineral, or to allow a relocation of the claim after the expiration of the statutory period within which they were allowed the right of selection and location. (5 L. D., 705.)

After said decision was rendered, John C. Robinson, assignee, applied for a survey of said location made in 1863, offering to make a deposit to cover the expense of said survey, which was denied by your office March 5, 1889, but in the decision of your office denying said application the surveyor general of Arizona was directed to order a hearing between the grant claimants and certain mineral claimants, whose applications to enter parts of said tract under the mining laws, are on file in your office, upon the following points:

295 "(1) As to whether or not the original claimants or their authorized agents or grantees knew, at the time of, or prior to the selection in 1863, of land under this claim, or at the time in 1866 of its amendment, of the existence of mines within the out-boundaries of the selection as designated by them in the written selections on file in your office; (2) as to whether, in point of fact, mines did exist within such out-boundaries or any of the lands therein situated were known in the vicinity to be mineral, at the time above specified."

From this decision said Robinson appealed, the material allegations of error being substantially to the effect that the Commissioner erred in failing to treat said claim as a perfected selection and location, which had been adjudicated by the approval of the surveyor-general of New Mexico, June 17, 1863, and that the Commissioner is without jurisdiction to re-open the question of the mineral character of the land, and to order a hearing for that purpose; that he erred in holding that the burden of proof was upon the grant claimants, and also in holding that the title to the location, made in 1863, "rests upon the confirmation or non-confirmation of the Las Vegas claim, to the extent at present claimed by the grantees thereof." While the Department held that it had no power to vacate or annul a selection made within the prescribed period of lands not known to contain mineral, yet it also held that, if claimants made selection of lands known to be mineral in character, such selection could be vacated, and the right to select other land in lieu thereof would be barred after the expiration of the statutory period.

The question as to the mineral character of this land has
296 never been finally and definitely passed upon, so as to preclude a further examination of that question.

In the application to locate the tract made by John S. Watts, in 1863, as attorney for the heirs of Baca, he states, that "said tract of land is entirely vacant, unclaimed by any one, and is not mineral to my knowledge." This application was approved by the surveyor-general, and in his letter transmitting it to the General Land Office he states, that as the location is far beyond any of the public surveys, he did not deem it necessary to procure any certificate from the register and receiver, as they could have no official knowledge concerning it. In reply to said letter, the Commissioner, on July 18, 1863, informed the surveyor-general that:

"Before the application of Location No. 3, of the heirs aforesaid,

can be approved by this office, it is necessary that our instructions of the 26th July, 1860, should be complied with by furnishing a statement from yourself and register and receiver that the land thus selected and embracing one fifth of the claim or 99,289 39-100 acres is vacant and not mineral."

On March 27, 1864, John S. Watts forwarded to the General Land Office a description of said location, again stating that it was vacant and not mineral, and also enclosed the certificate of the register and receiver that the claim is located upon unsurveyed lands, and, so far as the records of their office show, are vacant and not mineral lands. The surveyor-general, in response to said letter of July 18, 1863, replied:

297 "As I am personally unacquainted with that region of country, I cannot certify that the land in question is 'vacant and not mineral' or otherwise. Those facts can only be determined by actual examination and survey."

No further evidence of the character of the land embraced in said location seems to have been required, but on April 9, 1864, instructions were issued to the surveyor-general directing that said land should be surveyed at the expense of the grant claimants. No survey was made under these instructions, but on April 30, 1866, John S. Watts filed an application, accompanied by a diagram of the intended location, which had been erroneously described by him in his application of June 17, 1863, asking that the surveyor-general be instructed to correct the mistake, so as to change the initial point of the survey, and to commence at a point indicated in said amended application. The amendment was allowed, and instructions were accordingly given to the surveyor-general on May 21, 1866, in which he was instructed to "cause the survey to be executed in accordance with the amended description of the beginning point, which is described in Mr. Watts' application of the 30th April last, provided by so doing the outboundaries of the grant thus surveyed will embrace vacant lands, not mineral." The survey was not executed under these instructions, primarily, for the reason that the claimants failed to deposit the money to pay for the expense of said survey, and, afterwards, for the reason that large mineral deposits had been discovered on the tract located.

298 There seems to be no question that the land embraced in this location is mineral land. This is shown by the admissions of John A. Watts, in his application to relocate this claim, dated August 15, 1877, and by the admission of John C. Robinson in his application of February 13, 1885. But there are also on file in your office communications from various parties asserting claims to certain portions of said tract, under mineral entries, alleging that the mineral character of said land was notoriously known at the date of selection, and that at the time of the selection in 1863 the original locators of the claim well knew that it embraced old and well known and long used Mexican silver mines.

There is also among the papers in this case an affidavit made by Thomas Gardner, who swears that he has lived within twenty or thirty miles of the old Salero mine from 1857 to 1888, excepting a little over one year, and that when he came to Arizona the country

around the Salero mine (embraced in this location) was notoriously known as mineral land, and the Salero mine was known to every person as having been worked by the Jesuit Fathers; that the Wrightson brothers worked the old Salero and other mines during the years 1858 and 1859, and, perhaps, 1860, "and the commencement of the civil war between the north and the south broke up the mining camp entirely;" that in 1863 William Wrightson, with Gilbert Hopkins, came back to Arizona, and said they were going to open up the Salero mines again, but in about six weeks they were killed by the Indians.

299 Taking into consideration the admission of the claimants that the land is mineral, together with the allegations of the several claimants that its mineral character was known to the claimants at the date of location in 1863, and of the affidavit of Gardner that the mineral character of the land was a matter of common notoriety, there is sufficient warrant for the action of your office in ordering a hearing to determine the question as to whether said location was made with a knowledge of the mineral character of the land.

But, independently of this, the question as to whether the mineral character of the land was or was not known to claimants at date of location is immaterial. The act of June 21, 1860, authorized the heirs of Baca "to select instead of the land claimed by them an equal quantity of vacant land, not mineral," and the burden of proof is upon the claimants under said grant to show that the lands so selected or located are non-mineral lands, as no title to mineral lands can vest in them under said act, and the Department may at any time before the title passes from the government require the claimants to show that the land is not mineral, although the character of the land may not have been known to claimants at the date of selection or location. If upon the hearing the proof should show that the land embraced in the location is mineral, the mineral land should be segregated from the non-mineral land by survey, and the grant claimants will be entitled to such part of said location as may be shown to be non-mineral.

300 One of the alleged errors complained of in this appeal is, in holding that the title to the land embraced in this location rests upon the confirmation or non-confirmation of the Las Vegas claim, to the extent at present claimed by the grantees. The right of these claimants do not in any manner depend upon the present claim of the town of Las Vegas, nor is its extent to be measured by the quantity of land that may be awarded to said town upon the final disposition of that claim.

In carrying out the provisions of the act of June 21, 1860, the surveyor-general was instructed by the Commissioner of the General Land Office to first survey the Las Vegas claim, in order to ascertain the extent of the "tract of land as is claimed by the town of Las Vegas," and which was also claimed by Baca, and to furnish the claimants with a certificate of the quantity of land they were entitled to as an equivalent for the land claimed by them. Pursuant to these instructions, the surveyor-general surveyed the grant of the town of Las Vegas, and found it to contain 496,446.96 acres, and

notified the representatives of the heirs of Baca that they were entitled to select vacant, non-mineral land of equivalent quantity, in five bodies, and a duplicate of said certificate was sent to the General Land Office. This amount was determined by the proper officers, having jurisdiction to determine that question, to be the measure of quantity which the Baca heirs had the right to select within three years, and their adjudication is conclusive of that question, especially in view of the fact that the heirs of Baca acted upon said decision and made selection within the three years limited by the act,
301 after which no selection could be made.

The action of the surveyor-general in determining the quantity of the grant seems to have been recognized by Congress. One of the bodies of land, containing one-fifth of the quantity found by the surveyor-general to be the measure of the grant to the heirs of Baca, was located within the three years, as provided in the act, and Congress by act of July 11, 1864 (13 Stat., 125), authorized—

"the heirs of Luis Maria Baca to raise and withdraw the selection and location of one of the square bodies of land confirmed to them by said act, heretofore located by said heirs on the Pecos River, adjoining the Fort Sumner reservation, and to select and re-locate the same, in the manner provided by said act; * * * and upon such selection and re-location, the title to said square body of land, the same being the one fifth part of the private claim confirmed to said heirs, as aforesaid, so selected and re-located, shall be, and is hereby confirmed to the said heirs of the said Luis Maria Baca as fully and perfectly as if the same had been selected and located within three years from and after the approval of the act aforesaid."

Furthermore, other locations made upon this measure of quantity, and in the hands of other assignees, have been perfected and passed beyond the control of this Department.

You will therefore direct that a hearing be had, with a view to determine the character of the land embraced in said location, and if said land or any part thereof is found to be mineral, you will take action thereon in accordance with the directions herein given.

Herewith are returned the papers in the case.

Very respectfully,

GEO. CHANDLER,
Acting Secretary.

302 DEFENDANTS' EXHIBIT No. 32.

Counsel for defendants offer in evidence duly certified copy of a decision dated November 28, 1891, on file in the General Land Office, signed by the Secretary of the Interior, and addressed to the Commissioner of the General Land Office, and mark the same "Defendants' Exhibit No. 32."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 32 (except in so far as it may contain admissions against interest on the part of defendants and in favor of plaintiffs),

on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a copy of a copy, and no foundation has been laid for the introduction of such a paper; for the further reason that it purports to be a copy of a decision of the Secretary of the Interior, which is reported in Land Decisions, and is not admissible as evidence; for the further reason that it is not evidence of the facts therein stated; and for the further reason that it is dated November 28, 1891, whereas title vested in the heirs of Baca April 9, 1864, and the jurisdiction of the Land Department over said lands then ceased.

303 "B." DEPARTMENT OF THE INTERIOR,
M. E. L. GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 23, 1910.

I hereby certify that the annexed copy of letter dated November 28, 1891, is a true and literal exemplification of the original in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

304 B.

G. H. S. F. L. C. W. C. P. W. C. P.

7885-1891. DEPARTMENT OF THE INTERIOR,
WASHINGTON, *November* 28, 1891.

General —. Dated ——. Dec. 4 —.

Baca Float, No. 3.

The Commissioner of the General Land Office.

SIR: I have considered the motion for review of departmental decision of June 24, 1891 (12 L. D., 676), in the matter of the application for a survey of the lands selected in satisfaction of Baca Float No. 3.

This motion presents no new question but goes over the same ground that was necessarily gone over in the consideration of the appeal upon which the former decision was rendered. It is urged that under the provisions of the act of June 21, 1860 (12 Stats., 72), confirming this claim no officer except the surveyor-general of New Mexico, has any function in this matter and that his duties are merely ministerial and perfunctory. The Secretary of the Interior is charged with the supervision of public business relating to the public lands (Revised Statutes, section 441), and the Commissioner of the General Land Office is charged with the performance,
305 under the direction of the Secretary of the Interior, of "all executive duties appertaining to the surveying and sale of the

public lands of the United States or in anywise respecting such public lands, and, also such as relate to private claims of land." It is true that Congress has the power to impose upon some other officer the duties thus prescribed by these sections as pertaining to the offices of Secretary of the Interior, and Commissioner of the General Land Office, but in the absence of express provisions to that effect no intention to relieve said officers of any duties within the purview of said sections, will be presumed. It must, in the case now under consideration, devolve upon some officer to determine whether the lands selected are of the character prescribed by the said act of June 21, 1860, and I find nothing to indicate any intention to substitute, for the officer charged generally with the performance of such duties, some one else. The mere fact that it is declared the duty of the surveyor-general of New Mexico to survey and locate the lands selected does not justify the conclusion that the Secretary of the Interior and Commissioner of the General land Office were "carefully eliminated from the transaction" or even that the said surveyor-general's acts in the premises were not subject to the supervisory direction of the Commissioner of the General Land Office and the Secretary of the Interior. The objection to the jurisdiction can not be sustained.

In support of the objection to that part of the decision which directs a hearing to be had before the surveyor-general of
306 Arizona, it is urged (1) That the surveyor-general of Arizona has no authority in the premises the surveyor-general of New Mexico being commanded by the act of Congress to make the survey, (2) That a survey is necessary to any intelligent inquiry as to the character of the lands in said selection and (3) That none of the persons named by the Commissioner as desiring an early settlement of the question, is a proper party to the case.

The first grounds of objection can not, I think, be seriously urged. When the Territory of New Mexico was divided and that portion included in the limits of Arizona was created a separate surveying district, the duties theretofore devolving upon the surveyor-general of New Mexico, in relation to lands within such new district fell upon the surveyor-general of that district. This proposition is so plain that it seems unnecessary to discuss it further. The objection that an intelligent inquiry as to the character of the lands selected can not be prosecuted without a survey and marking of the out-boundaries is met and obviated by the direction to the surveyor-general contained in the Commissioner's order for a hearing in the following words:

If for the purpose of such hearing and in order to clearly ascertain the exact location of alleged mines with reference to the boundaries of said location it shall seem to you advisable or necessary to survey the out-boundaries of said claim, or any part thereof, you will suspend the hearing above provided for and notify the said Robinson and other grant claimants that they may make a deposit of the funds necessary to pay for such survey and for the office work necessary thereon, after you shall have made an estimate of the same.

You will then cause the same to be made in the same manner as surveys of private claims are made, &c.

307 The third specific objection made to this part of said departmental decision can not be sustained. This hearing is to determine whether the land selected by the grant claimants is of the character contemplated by the act under which it was selected and to the end that such investigation shall be full and complete, all parties asserting a claim to the land should be given an opportunity to be heard. This is all that has been done and I find no good reason for modifying the instructions in that particular.

Objection is made to assumptions of fact made in said decision, the following being quoted as one, "There seems to be no question that the land embraced in this location is mineral land." This sentence taken alone might be open to the objection that it prejudges the very question for the determination of which a hearing is ordered. Taking the whole decision, however, it is plain that it was intended to say that such a prima facie case had been made as justified further investigation, and it will be thus construed.

Objection is made to the statement that the burden of proof to show that said lands are non-mineral in character, is upon the claimants under said grant, but this objection can not in my opinion be sustained. The act of Congress authorized the selection of lands of a certain character and when the claimants presented a selection thereunder it certainly devolved upon them to affirmatively show the lands were of the character prescribed. By presenting a selection under said law the claimants affirmed its non-mineral character and they must stand ready to support such allegation. I do

308 not find that the instructions given are inconsistent with the laws of evidence and do not therefore find any nec-ssity for modifying the decision complained of in that respect. It is said that the inference is inevitable from the language of both the Commissioner and the Secretary, and therefore tantamount to an instruction that if any mineral land shall be found within the boundaries of the selection made then the whole selection must be rejected. This assertion is directly denied by the following quoted from said departmental decision:

If upon the hearing the proof should show that the land embraced in the location is mineral, the mineral land should be segregated from the non-mineral land by survey, and the grant claimants will be entitled to such part of said location as may be shown to be non-mineral.

It is further argued in support of this motion that only those lands known at the date of the selection to be mineral lands should be segregated from the tract thus selected, and, that the discovery of minerals, in any part of said lands, made after the date of selection can not affect the right and title of these claimants to said lands. The decision rendered in your office limited the inquiry to the two dates, that of selection in 1863, and of the amendment of such selection in 1866. While it is not said in so many words in the departmental decision that such instructions were in error, yet it was in effect so said. The following language was used:

The act of June 21, 1860, authorized the heirs of Baca 'to
309 select instead of the land claimed by them an equal quantity of vacant land not mineral,' and the burden of proof is upon the claimants under said grant to show that the lands so selected or located are non-mineral lands, as no title to mineral lands can vest in them under said act and the Department may at any time before the title passes from the government require the claimants to show that the land is not mineral, although the character of the land may not have been known to claimants at the date of selection or location.

This can be construed only to mean that the inquiry should extend to the present known character of the land as well as to its character as known at the date of selection. This holding is in entire accord with the principle announced in the case of Central Pacific R. R. Co. v. Valentine (11 L. D., 238). It was there said: No date is fixed in the grant at which the mineral character of the lands must be known, in order to bring them within the exception. If in fact mineral, they are within the exception, according to the plain terms thereof, whether their mineral character is known at the time of definite location or approval of survey, or not.

It is contended that the language in the acts making the grant to the railroad company is so different from that employed in the act now under consideration, that the rule laid down in the Valentine case, admitted to be right there, can not be applied here.

The excepting clause in the act of July 1, 1862 (12 Stats., 489), is in these words: "Provided that all mineral lands shall be excepted from the operation of this act." The act of July 2, 1864 (13 Stats., 356), contains the following:

310 And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler, or any lands returned or denominated as mineral lands, &c.

The act now under consideration provides that the beneficiaries thereunder may "select instead of the land claimed by them an equal quantity of vacant land, not mineral."

The evident intention in all these acts was to prevent the title to mineral lands from passing thereunder and to express that intention, the language in the act last mentioned is just as clear as that used in the others. The language used in the act under consideration, should be given the same prohibitive force as is accorded the other acts above mentioned. If this be true, and I do not think it can be successfully controverted, it follows that the reasoning in the Valentine case applies with equal force in the case now under consideration, and that the rule there laid down should be followed here. That rule was followed in the decision complained of and hence there is no reason to modify it as to that point.

It is further urged in this connection, in support of this motion, that under the act now being considered all jurisdiction or authority in the premises, was taken away from the Department of the In-

terior, and that, in that particular, said act differs from those making the grant to the railroad company, and therefore that a
311 different rule should obtain in this case. This question as to the jurisdiction of this Department has been discussed hereinbefore and I do not find it necessary to enlarge upon what was then said.

After carefully considering the questions presented by this motion for review in connection with the arguments both oral and written, presented by the attorney for the claimants, under said grant, I have found no sufficient reason for a conclusion different from that arrived at in the decision complained of, and said motion is therefore denied.

The papers are herewith returned.

Very respectfully,

JOHN W. NOBLE,
Secretary.

G. C.

312 DEFENDANTS' EXHIBIT NO. 33.

Counsel for defendants offer in evidence duly certified copies of certified transcript of papers on file in the General Land Office in the matter of application for survey of Baca Float No. 3, consisting of a communication from John W. Cameron to the Surveyor-General of Arizona dated June 9, 1893, of a letter dated June 17, 1893, from said Surveyor-General to said Cameron, of a letter dated August 14, 1893, from said Cameron to said Surveyor-General, and of a certificate attached to the same dated August 30, 1893, signed by said Surveyor-General, and mark the same "Defendants' Exhibit No. 33."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 33, on the ground that it is incompetent, irrelevant and immaterial, for the reason that it consists of copies of various letters, and no foundation has been laid for the introduction of such papers; for the further reason that it is not evidence of the facts therein stated; and for the further reason that it relates to the alleged amended location of 1866 and has no reference to the selection of June 17, 1863.

313 "B." DEPARTMENT OF THE INTERIOR,
M. E. L. GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 22, 1910.

I hereby certify that the annexed copy of certified transcript of papers in the matter of application for Survey of Baca Float No. 3, is a true and literal exemplification of said transcript in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

314 WASHINGTON, D. C., *June 9th*, 1893.

To Levi Manning, Surveyor General of Arizona:

Louis Maria Baca claimed under the grant from Mexico certain lands known as Las Vegas. The question was pending before Congress. The town of Las Vegas also claimed the lands. The Las Vegas claim was ascertained to contain 496,446.96 acres. So said the Commissioner of the General Land Office and the Secretary of the Interior. It was then a town, and now has a population of ten or twelve thousand. The Government recognizes fully the claim of Baca's heirs, and to the full extent of 496,446.96 acres. Congress had the power to confirm the Las Vegas grant to Baca's heirs or to reject it. To reconcile contesting claims and so far as possible to give satisfaction to all concerned Congress proposed an exchange of lands. Congress with full power to contract by the sixth Section of the Act of June 21st, 1860, twelfth Statute 72, made the following proposition:

That it shall be lawful for the heirs of Louis Maria Baca, who make claim to the said tract of land, as is claimed by the town of Las Vegas to select instead of the land claimed by them, an equal quantity of vacant lands, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five (5) in number; and it shall be the duty of the Surveyor General of
New Mexico to make survey and location of the lands so se-
315 lected by the heirs of Baca, and thereunto required by them.
Provided however that the right hereby granted to the said heirs of Baca shall continue in force during three (3) years from the passage of this act and no longer.

It thus appears that there was a controversy between the town of Las Vegas and the heirs of Baca as to the title of the 496,446.96 acres of land. The question was before Congress, and in order to settle the controversy so as to give satisfaction to both claimants the Act was passed. It was a mere proposition to the heirs of Baca, which they might, or might not have accepted. They might have declined to accept it and continued to assert their claim to Las Vegas.

It appears however, that they chose to accept it on the terms offered by the Government. The duty imposed on Baca's heirs was simple and plain. They agreed to give up their claim to Las Vegas, and accepted the terms offered, that is to say, to select from bodies of land in New Mexico, not mineral, or as the Secretary says, not known to be mineral, in square bodies, each tract to contain 99,289.39 acres, and to select it within three (3) years from the 21st day of June, 1860. All this they did, and this was all they were required to do. They had nothing else to do except to report their location to the Surveyor General of New Mexico, and require him according to the contract to survey it. The Government bound itself, in law, equity and morals to allow the Surveyor General to
perform this work, not when required by the President, the
316 Secretary of the Interior or the Commissioner of the General Land Office, but when required by the heirs of Louis Maria Baca. It was a duty imposed by the highest authority in the

land on the Surveyor, when required to perform this duty. It was an act committed to him and required of him. A higher authority than the President, the Secretary or the Commissioner, had made it his duty, without consulting any body, except the heirs of Baca, who probably would never have accepted the proposed contract, if they had known that any other person had to be consulted, except the Surveyor General. These floats were numbered 1, 2, 3, 4 and 5, all of them was selected in the same manner as was number 3, the one under consideration. This was approved by the Surveyor General of New Mexico on the same day it was selected and located, but the Survey was never completed. An amended application was filed, and the Land Office on May 21, 1866, issued instruction for the survey as amended. It is this location that should be surveyed.

It thus appears that no duty is imposed by the act on the Register and Receiver, none on the Commissioner of the General Land Office, and none on the Secretary of the Interior. Congress saw proper to impose this duty alone on the Surveyor General of New Mexico. Congress had the right and the power to do this. It was left to Baca's heirs to decide when they wanted the survey, and all they had to do was to require it at the hands of the Surveyor General.

Not even is the issuance of a patent necessary. Title passed by virtue of the Act of Congress as soon as the selection and lo-
317 cation were made. This was done within the time required and the title passed to the heirs of Baca. And all that remains to be done is to make the survey, not to pass title, but in order that the boundaries may be defined so that it may be known where the lines are which divided this land from the public lands of the United States. Why has not the survey been made before, may be asked. The records show that the selection and location were approved by the Surveyor General. This was sufficient to pass the title as was said in the case of Baca claim No. 4. "The question as to the mineral or non-mineral character of this land has been passed upon by competent authority; the title has passed from the Government and has been vested in private individuals. The conditions and provisions of the Act of June 21, 1860, were as respects this question that the selection and location should be on land determined at the time of such location when the title passed to be non-mineral land. The Surveyor General did not undertake and had no power to impose conditions not in the Act." (See report of the General Land Office, 1879, page 211). The Secretary of the Interior approved this finding 5 L. D. 707, on March 27, 1864. The Register and Receiver certifies that the land was vacant and not mineral; and on April 2, 1864, the Surveyor General of New Mexico filed his second certificate to the same effect. In April 1864, Commissioner Edmounds sent instructions to the Surveyor General of Arizona to make survey, but required the owners to advance the money to pay for the same, a condition not to be found in the Act, nor in any law of Congress. In 1866 another order to survey
318 the corrected location was made, but the same condition was imposed. The validity of the location was passed on by the Secretary of the Interior.

The land was not known to be mineral at the date of the location and selection, and that is what the law required. All the papers show that it was not known to be mineral, nor is there any proof that it is now known to be mineral, but if there was, the title passed when the selection and location were approved, and any question of that character has nothing to do with the duty of the Surveyor General to make the survey. It was not contemplated by the Act, that if after selection, location and approval, mineral should be discovered, that the title should thereby be invalidated. As was well said by the Commissioner of the General Land Office in 1879 in the case of Baca claim No. 4 "If after fifteen years the question as to the mineral character of the land may be reopened, why may it not be raised again after the lapse of any number of years. If the question may be reopened as to the land granted under the provisions of the act of June 21, 1860, why may it not as to the land acquired under the homestead, pre-emption and other Acts of Congress? Would such titles ever be considered secure? It is clear that there was a contract in the higher sense of the term, binding in law, equity and morals on the part of the United States, that if Baca's heirs would release all claim to Las Vegas, they might select and locate five (5) claims in square form equal in amount to the Las Vegas claim. The number of acres has been definitely and incontrovertibly
319 settled. Baca's heirs have relinquished all claim to Las Vegas and the Government has disposed of it. They have selected the five pieces of land, and within the time required, and their selections and locations have been approved. The Government solemnly contracted that the Surveyor General should survey the claim whenever required by the heirs or their assigns. They have required it, and it not having been done, they now require it again. It is the solemn duty of this officer to obey the law. Congress has required it of him. Nobody has a right to hinder him in the execution of the duty thus imposed. If Congress had intended to order him to do this thing under the direction of the Secretary or the Commissioner, it would have said so. It was a duty solely and entirely confided to him. It is his duty to comply with the law and a court of proper jurisdiction and by proper proceedings may compel him to do so.

If the parties entitled to have the survey made see proper to decline to invoke the aid of the courts, there can be no good reason why the owners of the claim may not proceed to have the land surveyed themselves in order to ascertain their proper boundaries. A law somewhat similar to this was passed by Congress (R. S. U. S. Section 2488) with regard to swamp lands in the State of California. The law provides: "That it shall be the duty of the Commissioner of the General Land Office to certify over to the State of California as swamp and over-flowed lands all the land represented as such upon the approved township surveys and plats whether made
320 before or after the 23rd day of July 1866, under the authority of the United States.

In the case of Davis 13 L. D. page 129, the survey was approved by the Surveyor General representing the land to be swamp and

over-flowed. The party claiming the land came forward after the approval and alleged that the land was not swamp. Secretary Noble in passing on the case said "that where a tract of land has been returned as swamp by the Surveyor General, the question of the character of the land cannot be raised, as under the law, the land goes to the State." And he quotes from a decision of Secretary Schurz in which he said "This clause secures to California all the lands which the Surveyor General officially reports to be swamp, whether they are so or not. He also quotes from the Supreme Court 121 U. S. 488."

The representation of the lands as swamp and over-flowed on the approved township plat would be conclusive as against the United States that they were such lands: The Supreme Court of California (73 Cal. 6) held that when the plat of the township representing the lands to be swamp and over-flowed is approved, the title to such lands rests in the state, though the Commissioner has not made the certificates required by the Act. The title to the land under such circumstances has passed entirely beyond the control of the United States Land Department and beyond the power of the federal Government. The law made it the duty of the Commissioner to certify lands of this character, but because he had refused to do so, did not prevent the title from passing to the State.

321 The following proposition seems to be fully established.

1st. Baca's heirs had a claim to Las Vegas which Congress recognized as a valid claim.

2nd. In order to settle questions of conflict between Baca's heirs and the town of Las Vegas, Congress proposed that if Baca's heirs would release all claim to Las Vegas, they might select five (5) bodies of land in square form equal in aggregate to the acreage of Las Vegas, which the Secretary says was ascertained to be 496,446.96 acres.

3rd. The land was to be selected and located within three (3) years of the date of the Act.

4th. The land was to be such as was not known to be mineral in character.

5th. The Surveyor General was to survey it when required by the heirs of Baca.

The evidence on file shows conclusively that Baca's heirs have faithfully and to the very letter complied with every requirement. They have demanded a survey from the Surveyor General several times. Surveys have been ordered by the Commissioner, and yet no satisfactory survey has been made. Title is vested in the Baca heirs. And of this it seems that there can be no question. They have a right by law to have it surveyed. The Surveyor General is the official required to do it by law. He has no right to delay it. He needs no instructions from any one. Congress having full power to act, has agreed that he shall do it whenever required, not by any official of the Government, but by the parties who gave up

322 their claim, for which Baca claim No. 3 was given in part in exchange. These Baca claims as they now stand, are not private land claims — Las Vegas was, but these claims are grants made

by Congress of Public lands of the United States, the survey of which is incumbent on the United States without charge to the grantees. Congress may require parties who own lands granted by foreign Government to pay for the survey of the same. The same requirement might have been made in the contract with Baca, but it was not done, and there is no power now to make it. If Baca's heirs see proper to pay for a survey, they have the right, but they are entitled to it without paying. The survey should be made at once, and all other questions which may arise can be settled by the proper authorities.

I do not lose sight of the idea that generally the Surveyor Generals act under the instructions and subject to the control of the Land Department and the Secretary of the Interior, but it is clear that in this case Congress intended, by the plain letter of the law to confide this duty to the Surveyor General unincumbered by any other authority whatever, as Congress had the right to do.

Now therefore, in accordance with the Act of Congress, and as one of the owners of this claim Baca No. 3, and representing all of them, I hereby require of you to make survey of said amended location, in accordance with the law and your duties thereunto.

(Signed) JNO. W. CAMERON.

Indorsed as follows: "Application for survey of Baca float
323 No. 3, by John W. Cameron. June 9th, 1893." Rec'd June 15th, 1893.

TUCSON, ARIZONA, *June* 17, 1893.

Mr. John W. Cameron, Washington, D. C.

SIR: This office has received your application dated June 9th, 1893, requesting that a survey be made of Baca Float No. 3, located in Pima County, this Territory.

After a careful examination of the papers on file in this office as well as the Act of Congress under which you insist it is my duty to make such survey, I decline to grant your application for the following reasons:

I personally know the land to be mineral in character, and assert that it would have so appeared to original claimants in making the selection if they had acted in good faith. The selection having been made in direct violation of the Act referred to, it is in no way incumbent upon this office to further consider the matter.

You are hereby notified of your right of appeal to the Commissioner General Land Office.

Very truly,

(Signed) LEVI H. MANNING,
U. S. Surveyor General.

324 TUCSON, ARIZONA, *July* 20, 1893.

Mr. John W. Cameron, Washington, D. C.

SIR: This office has received your application dated June 9th, 1893, requesting that a survey be made of Baca Float No. 3, located in Pima county, this Territory.

After a careful examination of the papers on file in this office as well as the Act of Congress under which you insist it is my duty to make such survey, I decline to grant your application for the following reasons:

I personally know the land to be mineral in character, and assert that it would have so appeared to original claimants in making the selection if they had acted in good faith. The selections having been made in direct violation of the Act referred to, it is in no way incumbent upon this office to further consider the matter.

You are hereby notified of your right of appeal to the Commissioner General Land Office, thirty days from this date being allowed within which to file said appeal.

Very respectfully,

(Signed) LEVI H. MANNING,
U. S. Surveyor General.

325 WASHINGTON, D. C., *August* 14, 1893.

Levi H. Manning, Surveyor General, Tucson, Arizona Ter'y.

SIR: I hereby appeal from your decision rendered July 20th, 1893, and received in this City by mail July 28th, 1893, from my application for a survey of Baca Float No. 3, located in Pima County, Arizona, to the Commissioner of the General Land Office. I assign as errors in your decision:

1st. The act of Congress, granting Baca Float No. 3 commanding you to have said land surveyed when required is mandatory, and it was your duty to have obeyed the law, as you were required to do.

2d. Error in relying on what you call your "personal knowledge that the land is mineral in character, as you should have looked to the record and not to your personal knowledge in rendering your decision.

3d. In asserting without any evidence to support your assertion that the original claimants did not act in good faith.

4th. In asserting that the selection was made in direct violation of the Act of Congress.

5th. It is not a fact that the land was known to be mineral at date of selection.

6th. It is not a fact that you personally know the land to be mineral in character.

326 7th. Your decision is based on your assertion and not on the facts or the record.

8th. Your decision is not supported by the record, or the facts, and is in direct violation of law.

9th. For errors both as to the law and the facts.

(Signed) JNO. W. CAMERON.

Indorsed as follows: "Appeal from Decision of Surveyor General in re Baca Float No. 3." by John W. Cameron. Washington, D. C. Aug. 14, 1893. Rec'd (Regst.) Aug. 21, 1893.

Office of U. S. Surveyor General for Arizona,

TUCSON, A. T., *August* 30, 1893.

I hereby certify that the foregoing papers, application of John W. Cameron, for the survey of Baca Float No. 3, dated Washington, D. C., June 9, 1893; letters of Surveyor General dated Tucson, Arizona, June 17th, and July 20th, 1893, declining said survey; appeal of John W. Cameron from said decision, dated Washington, D. C., August 14, 1893, are correct copies of the papers they purport to be transcripts of, on file in this office.

[SEAL.] LEVI H. MANNING,
U. S. Surveyor General for Arizona.

327 (Endorsed:) In the matter of the Application for Survey of Baca Float No. 3. Transcript.

328 DEFENDANTS' EXHIBIT No. 34.

Counsel for defendants offer in evidence duly certified copy of a plat of official survey showing the location of Baca Float No. 3 under the applications of June 17, 1863, and April 30, 1866, the same being exemplified from the official survey on file in the General Land Office; and mark the same "Defendants' Exhibit No. 34."

329 DEFENDANTS' EXHIBIT No. 36.

Counsel for defendants offer in evidence duly certified copy of a decision dated July 25, 1899, signed by the Secretary of the Interior, addressed to the Commissioner of the General Land Office; and mark the same "Defendants' Exhibit No. 36."

Counsel for plaintiffs object to the admission of defendants' proposed Exhibit No. 36 (except in so far as it may contain admissions against interest on the part of defendants and in favor of plaintiffs), on the ground that is is incompetent, irrelevant and immaterial, for the reason that it is a copy of a copy, and no foundation has been laid for the introduction of such a paper; for the further reason that it purports to be a copy of a decision of the Secretary of the Interior, which is reported in Land Decisions, and is not admissible as evidence; for the further reason that it is not evidence of the facts therein stated; and for the further reason that it is dated July 25, 1899, whereas title vested in the heirs of Baca April 9, 1864, and the jurisdiction of the Land Department over said lands then ceased.

330 "B." M. E. L.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 23, 1910.

I hereby certify that the annexed copy of letter dated July 25, 1899, is a true and literal exemplification of the original in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

331 K. A. B. P.
F. L. C.
DEPARTMENT OF THE INTERIOR, A. B. P.
WASHINGTON, *July* 25, 1899.

2266-1899.
W. V. D.

Baca Float No. 3.

Application for Survey.

The Commissioner of the General Land Office.

SIR: May 6, 1899, your office transmitted to the Department an application by the present owners of the grant known as "Baca Float No. 3," for the survey of said grant as selected or located in the Territory of Arizona, formerly a part of the Territory of New Mexico.

The matter of the survey and location of this grant has been several times before the Department and the action taken therein will be seen by reference to the former departmental decisions of June 15, 1887 (5 L. D., 705), June 24, 1891 (12 L. D., 676), and November 28, 1891 (13 L. D., 624).

The facts relative to the grant are as follows:

By section 6 of the act of June 21, 1860 (12 Stat., 71-2), Congress, for the purpose of settling a dispute between certain claimants under conflicting Mexican grants to a large body of land in the vicinity of Las Vegas, New Mexico, provided:

332 That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said same tract of land as is claimed by by the town of Las Begas Vegas, to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them; Provided, however, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

It was subsequently ascertained that the grant to the town of Las Vegas embraced an area of 496,446.96 acres of land, and in accordance with that ascertainment the Baca heirs were entitled, under the act aforesaid, to select and locate five different tracts or bodies of land, of 99,289.39 acres each, in square form, within what was, at the date of the act, known as the Territory of New Mexico. The grant now under consideration is the third of the series of selections or locations thus authorized. Hence, its name: Baca Float No. 3.

October 31, 1862, John S. Watts, as attorney for the Baca heirs, filed in the office of the surveyor-general of New Mexico a memorandum dated October 30, 1862, in which he set forth that he had that day selected as one of the five tracts authorized to be selected by said act of June 21, 1860—

—a place called and known as the Bosque Redondo, on the River Pecos, the centre of said location to be a point on the North East bank of the River Pecos, five miles below the mouth of the Canon forming the valley of said river Pecos, the location being so surveyed as to form a square on that centre, with the lines running East & West North & South, the distance required to form the area of said location.

333 November 8, 1862, the register and receiver of the land office at Santa Fe, New Mexico, certified that there was nothing of record in their office showing the lands to be occupied or that any portion thereof was mineral. The Surveyor-general reported the selection to your office, accompanied by the certificate of the register and receiver, and his own certificate stating the selection to be the third of the series authorized by said act of 1860, and that he believed the lands embraced thereby to be vacant and not mineral.

January 18, 1863, application was made to your office by said John S. Watts, attorney for the Baca heirs, to be allowed to withdraw the selection thus made with a view of making another selection within the time prescribed by the act in a more desirable locality. This application was allowed by your office February 5, 1863, and no further mention of the prior selection need be made.

Thereupon a new selection was made June 17, 1863, within the time prescribed by the statute, by said John S. Watts, attorney for the Baca heirs. The tract selected was described in the application filed in the office of the surveyor-general having jurisdiction in the premises, as follows:

* * * Commencing at a point one mile and a half from the base of the Salero mountain, in a direction North forty five degrees East of the highest point of said mountain, running thence from said beginning point, West, twelve miles, thirty six chains and forty four links, thence South, twelve miles, thirty six chains and forty four links, thence East twelve miles thirty six chains, and forty four links, thence North twelve miles, thirty six chains and forty four links, to the place of beginning; the same being situate in

334 that portion of New Mexico, now included by act of Congress, approved February 24th, 1863, in the Territory of Arizona.

* * *

It was further stated by the applicant that—

* * * Said tract of land is entirely vacant, unclaimed by anyone, and is not mineral to my knowledge.

The selection thus described was approved by the surveyor-general, and June 18, 1863, the papers in the case were by him forwarded to your office accompanied by a statement of his said approval, and the further statement that as the land selected was situated far beyond the public surveys he had not deemed it necessary to procure

any certificate from the register and receiver of the local land office because, from the nature of the case, they could not officially know anything concerning it.

July 18, 1863, your office acknowledged receipt of the papers forwarded by the surveyor-general as stated, but held that before the selection could be approved by your office a statement from the surveyor-general and register and receiver to the effect that the land embraced by the selection is vacant and not mineral should be furnished.

March 27, 1864, the attorney for the Baca heirs furnished certificates from the register and receiver at Santa Fe, New Mexico, to the effect that the lands embraced by the selection were unsurveyed, vacant and not mineral as far as they had any information on the subject; and April 2, 1864, the surveyor-general, replying
335 to your said office communication of July 18, 1863, stated in substance that there was no evidence in his office tending to show that the land selected is mineral or that it is occupied; that there had been as yet no public surveys in the neighborhood of the tract, and for that reason there was no record of or concerning the land in his office, or in the local land office of New Mexico; that he was personally unacquainted with the land and therefore could not certify that it was vacant and not mineral; that such facts could only be ascertained by actual examination and survey.

April 9, 1864, your office appears to have taken the matter up for further consideration, and the same "having undergone a careful examination," as stated in your office communication of that date addressed to the surveyor-general of Arizona, the certificate of approval by the surveyor-general of New Mexico "under whose jurisdiction the application properly came at the date of its approval," was accepted as sufficient and a survey of the grant under the selection thus approved was authorized and directed to be made. Instructions for the survey were given in minute detail to the surveyor-general of Arizona who was required to proceed with the work without delay whenever the grant claimant should pay or secure to be paid a sum of money sufficient to cover the costs of the same, and to make return of "complete survey and plat to be placed on file for future reference as required by law." The survey was not made, however, and thus the matter seems to have rested until April 30,
1866, when the said John S. Watts as attorney for the Baca
336 heirs, addressed to your office a communication which purported to be an amended application for the "relocation" of said claim No. 3, wherein, after referring to the original selection of June 17, 1863, it was said:

* * * I further state that the existence of War in that part of the Territory of Arizona and the hostility of the Indians prevented a personal examination of the locality prior to the location and not having a clear idea as to the direction of the different points of the compass when the subsequent examination of the location was being made by Mr. Wrightson in order to have the location surveyed it was found that the mistake made would result in leaving out most of the land designed or intended to be included in said location. Mr. Wrightson was killed by the Indians and no survey has been

made, because of said Mistake in the initial point of said location. Under these circumstances I beg leave to ask that the Surveyor-General of New Mexico be authorized to change the initial point so as to commence at a point three miles West by south from the building known as the Hacienda de Santa Rita running thence from said beginning point North twelve miles 36 chains and 44 links, thence east twelve miles 36 chains and 44 links, thence south twelve miles 36 chains and 44 links thence west twelve miles 36 chains and 44 links to the place of beginning. I beg leave further to state that the land which will be embraced by this change of the initial point is of the same character of unsurveyed vacant public land as that which would have been set apart by the location as first solicited but it is not the land intended to have been covered by said location but the land to be included within the boundaries above designated is the land that was intended to be located and was believed to have been located upon until preparations were made to survey said location. Under this state of the case it is hoped that directions will be given to the Surveyor-General to correct the mistake.

By communication of your office dated May 21, 1866, addressed to the surveyor-general at Santa Fe, New Mexico, (the Territories of New Mexico and Arizona having been by act of July 2, 1864, 13 Stat., 344, 353, consolidated into one surveyor-general's dis-
337 trict) reference was made to the previous instructions of April 9, 1864, to the surveyor-general of Arizona for the survey of the grant under the original selection or location of 1863, and also to the said amended application of April 30, 1866, and thereupon further directions were given for the execution of the survey "in accordance with the amended description of the beginning point which is described in Mr. Watts's application of the 30th of April last, provided by so doing the out boundaries of the grant thus surveyed will embrace vacant lands, not mineral."

It does not appear that this so-called amended application was ever approved by the surveyor-general, or that any action was taken by that officer looking to such approval. June 11, 1866, he acknowledged receipt of your said office communication of May 21, 1866, and submitted an estimate of the probable cost of the survey, accompanied by the statement that upon being advised of the deposit of such estimated sum of money for the purposes of the survey, he would proceed to have the same executed in accordance with the said instructions of April 9, 1864, and of May 21, 1866. July 2, 1866, the attorney for the Baca heirs was notified of the estimated cost of the survey and required to make deposit of the amount thereof, but the deposit was never made nor was the survey ever executed.

From a diagram or plat prepared in your office apparently for the purpose of showing the proximate position on the face of the earth of the selection or location as made, June 17, 1863, and the
338 relative position of the selection or location under the so-called amended application of April 30, 1866, it appears that the latter lies almost wholly to the east and north of the former, and that but a very small portion of the land embraced by the latter is within the limits of the former.

August 15, 1877, John H. Watts, representing himself to be the son of the aforesaid John S. Watts (then deceased), and as attorney for the heirs of his father, and part owner of the grant, addressed a communication to your office in which he requested that permission be given him to "relocate" said Baca Float No. 3, on the stated ground that the lands embraced by the selection or location previously made by his father were supposed to be mineral, though thought to be vacant and not mineral when the selection was made. This request was denied by your office September 20, 1877, on the ground that the act of June 21, 1860, expressly limited the right of selection thereunder to the period of three years from its date. October 10, 1877, another application was made to "relocate" the grant on the alleged ground that subsequently to the former "location," mineral had been discovered thereon by various persons and companies who were then engaged in hunting for gold, silver, and other precious metals within the boundaries of said claim to the outster of the owners thereof. This application was also denied for the reasons given in the denial of the former one.

Thus the matter remained, apparently, until February 13, 1885, when John C. Robinson, an alleged owner of the grant, ad-
339 dressed to your office a communication setting forth the selection of June 17, 1863, and the so-called amended selection of April 30, 1866, respectively; stating in substance that, on account of the hostility of the Indians, no survey of the claim had ever been made; that no definite action had been taken by your office in the premises, "nor could the locations selected have been confirmed for the reason that the land was mineral;" and asking that he be authorized to "locate" the grant on land non-mineral within the limits of what was known as the Territory of New Mexico on June 21, 1860.

March 21, 1885, your office considered the application of Robinson and held that the same should be allowed.

The matter subsequently came before the Department, however, and by decision of June 15, 1887, supra, the action of your office was disapproved and it was held that there is no power or authority in the Land Department to authorize a selection or location under the grant after the expiration of the time limited by the statute.

Following his decision numerous protests against both the selection of 1863 and the so-called amended selection of 1866 were forwarded to your office by various and sundry persons alleging in substance that about three-fourths of the lands embraced in the selection of 1863 were mineral; that nearly all the lands covered by the amended selection of 1866 were mineral; and that such had been the known character of the lands for over one hundred years. Considerable correspondence was had by your office with the protestants and others relative to the subject-matter of said pro-
340 tests, during the years 1887 and 1888, but no definite action looking to the survey of the grant or to a final adjustment of the controversy resulted therefrom.

December 21, 1888, the attorney for said John C. Robinson filed in your office a formal application for the survey of the grant under

the existing selection, and offered to make deposit of the necessary funds to cover the cost of such survey. Upon consideration of this application your office, in a communication of March 5, 1889, addressed to the surveyor-general of Arizona, directed that a hearing be had for the purpose of determining the known character of the lands claimed, at the date of the selection of 1863 and at the time of said amendment of 1866, and as an incident to said hearing, but as such only, the surveyor-general was authorized to make preliminary survey of the out boundaries of the claim upon payment of the cost thereof by the grant claimant, as far as deemed necessary or advisable to aid in the determination of the question submitted, but no farther.

An appeal was taken from that action to the Department, resulting in the decision of June 24, 1891, supra, adhered to on review, November 28, 1891, supra, wherein the order for the hearing was approved with the modification that the inquiry should be directed to the known character of the land at the date of the hearing, and not the dates of the selection of 1863 and so-called amendment thereof, as specified in the order of your office. The hearing thus ordered has never been had, and so the matter has stood until the receipt of your office communication of May 6, 1899, first

341 above mentioned.

Such are the facts shown by the record as far as deemed material to the consideration and determination of the pending controversy.

The present applicants express a willingness to deposit to the credit of the surveyor-general of Arizona a sum of money sufficient to pay the cost of an official survey of the grant as soon as notified of the amount required. Your office in the said communication of May 6, 1899, recommends that a survey of the exterior lines of the claim, at least, be authorized, and that all questions relating to the character of the lands be left for future determination by the Department and the courts.

It must be apparent to all concerned that the interests of the government and the grant claimants alike demand that this matter—so long pending before the Land Department—should be speedily and finally adjusted.

There can be no dobut that the heirs of Luis Maria Baca had the right for the period of three years after the act of June 21, 1860, to select in one square body within the Territory of New Mexico as it then existed, as and for the one-fifth part of their grant made by said act, and as No. 3 of the series of selections thereby authorized, vacant lands, not mineral, to the full quantity now claimed in this case.

The questions presented by the record are:

1. Is the selection of June 17, 1863, binding upon the applicants for survey, or are they entitled to claim under the so-called amended selection of April 30, 1866?

342 2. Is the question as to the character of the land selected—that is, whether vacant and not mineral and therefore subject to the grant, or occupied, or mineral, and for that reason not

subject to the grant—to be determined with relation to the date of the selection, or with reference to the date of the approval of the survey of the claim?

3. By whom and in what manner is the character of the land to be ascertained and determined?

1. It will be observed that by express provision of the act of June 21, 1860, the right of selectiof thereby granted was to continue in force during the period of three years from the passage of the act, "and no longer." The language used is so clear and explicit on this point that there would seem to be scarcely room for construction. The right to select was to continue in force for three years, and no longer. If not exercised within that time the right no longer existed. In other words, if not previously exercised, the right of selection became extinct at the expiration of the time limited, and could not be exercised thereafter. This view is supported by the recent case of Shaw v. Kellogg (170 U. S., 312), and its correctness will hardly be questioned. How do the grant claimants in this case stand with reference to this matter?

The selection of June 17, 1863, was within time and appears to have been in all respects regular. It was approved by the surveyor-general, whose approval, subsequently supported by the certificates of the register and receiver as shown, was accepted by your
343 office and the survey of the claim ordered.

The application of April 30, 1866, filed after the expiration of the three years' limitation, purported in name to be an amendment of the former application or selection, but the courses of the exterior lines of the claim as therein given are totally different from those of the original selection, and besides, it is expressly stated in the new application that the lands embraced thereby are not the same as those covered by the original selection. These facts taken in connection with the diagram or plat hereinbefore referred to (which is a part of the record in the case) showing the relative positions on the earth's surface of the tracts embraced by the selection of 1863 and the so-called amended selection, indicate very clearly that instead of the application of April 30, 1866, having for its object the amendment of the selection of June 17, 1863, with a view to correcting mistakes in the description of the exterior lines thereof or of giving greater certainty thereto, it was in reality, except as to the very small area common to both, an application to make a new selection, with a situs almost wholly removed from that of the selection of 1863. It is not believed that such a change in the locus of the claim as was thus attempted to be made can be recognized under the pretext or claim that the change was simply by way of amendment of the existing selection.

It is not necessary to deny or even question that the Baca heirs would have had the right, after the expiration of the three years' limitation, or that their assignees would now have the right
344 to make necessary amendments of description for the purpose of correcting ascertained mistakes, if any, so as to cause the record of the claim to conform to its position upon the earth's sur-

face as actually selected within the time prescribed by the statute, if a selection had been made and marked upon the ground. But such is not the case here. The application of April 30, 1866, sets forth that owing to the hostility of the Indians a personal examination of the locality was prevented prior to the selection of June 17, 1863, and that upon such examination subsequently had it was found that a mistake had been made whereby most of the land designed to be included in the selection had not been so included. Manifestly if there had been no personal examination of the locality prior to the selection of 1863, there could have been no location or marking of the claim upon the earth's surface prior to that time, and consequently the selection of 1863 could have had no fixed locus other than that indicated by the record of the selection itself. There was therefore no marked boundaries of the claim on the earth's surface, to conform to which it was necessary or proper that an amendment be made of the description contained in the selection of 1863.

It was not simply a "mistake in the initial point" of this selection that was sought to be corrected by the application of 1866, as therein suggested, but a complete change of the selection was thereby asked for, including as well the courses of the exterior lines of the claim, as the "initial point" thereof. Under these circumstances to
345 allow the so-called amended selection to stand would be, in reality, to allow a new selection under the grant after the expiration of the time limited for the exercise of the right of selection, and for this there is no authority found in the statute making the grant or elsewhere. The Department is therefore of the opinion that the grant claimants are bound by the selection of June 17, 1863, and that they can not be allowed to take under the application of April 30, 1866.

II. In the case of Shaw v. Kellogg, supra, the Supreme Court had under consideration selection No. 4 of the series authorized by said act of June 21, 1860, and in the discussion of the questions there presented it was said (page 332):

The grant was made in lieu of certain specific lands claimed by the Baca heirs in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere within the limits of New Mexico. The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was co-extensive with the limits of New Mexico. We say 'lands then known to contain mineral,' for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and it would be an insult to the good faith of Congress to suppose that it did not intend that the title when it passed should pass absolutely, and not contingently upon subsequent discoveries.

Under the authority of that case it would seem clear that the time

with reference to which the character of the land is to be determined is the date of the selection and not the date of approval of
346 the survey of the claim, as formerly held by the Department, and nothing further need be said here on that subject.

III. But by whom and in what manner is the character of the land to be determined? The granting act places the duty of surveying and locating the lands selected upon the surveyor-general of New Mexico. In the Shaw-Kellogg case, supra, this question was also considered by the Supreme Court, and it was there said (pages 333-334):

How was the character of the land to be determined, and by whom? The surveyor general of New Mexico was directed to make survey and location of the land selected. Upon that particular officer was cast the specific duty of seeing that the lands selected were such as the Baca heirs were entitled to select. It is not strange that he was the one named; for, in the original act of 1854, which made provision for the examination of these various claims, the duty of such examination was cast upon the same officer, and he was there required "to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico; and, for this purpose, may issue notices, summon witnesses, administer oaths and do and perform all other necessary acts in the premises,' and it was upon his report that Congress acted. Further, he was the officer who, by virtue of his duties, was most competent to examine and pass upon the question of the character of the lands selected. We do not mean that Congress thereby created an independent tribunal outside of and apart from the general Land Department of the Government. On the contrary, the act of 1854 provided that he should act under instructions from the Secretary of the Interior, and so undoubtedly in proceeding to make survey and location as required by section 6 of the act of 1860, he was still subject to the control and direction of the Land Department; but while he was not authorized by this section to act in defiance or independently of the Land Department he was the particular officer charged with the duty of making survey and location, and it was for him to say, in the first instance at least, whether the lands so selected, and by him surveyed and located, were lands vacant and non-mineral.

347 The act of 1854 thus referred to is the act of July 22, 1854 (10 Stat., 308), which, among other things, established the office of surveyor-general of New Mexico, and, in section 8 thereof, which was still in force when the survey in that case was made, defined the powers and duties of that officer as stated by the court. By a later act, to wit, the act of July 15, 1870 (16 Stat., 291, 304), it was provided:

That it shall be the duty of the Surveyor-General of Arizona, under such instructions as may be given by the Secretary of the Interior, to ascertain and report upon the origin, nature, character, and extent of the claims to lands in said Territory, under the laws, usages, and customs of Spain and Mexico; and for this purpose he shall have all the powers conferred, and shall perform all the duties

enjoined upon the Surveyor-General of New Mexico by the eighth section of an act * * * approved July twenty-second, eighteen hundred and fifty-four.

While by the act of March 3, 1891 (26 Stat., 854, 861), establishing a court for the settlement of unconfirmed private land claims, said section 8 of the act of 1854, and all amendments or extensions thereof (which would include said extension act of July 15, 1870) were repealed, yet there has been no repeal of the specific provision of the act of 1860, placing the duty of surveying and locating the lands selected thereunder upon the surveyor-general. True the officer named was the surveyor-general of New Mexico, but the Territory of Arizona had not then been formed, and there can be no doubt that the surveyor-general of that Territory subsequently established,
within whose present jurisdiction the lands are situated, law-
348 fully succeeds with reference to the claim here in question to the duties imposed by said act upon the surveyor-general of New Mexico.

Nor can there be any doubt that the surveyor-general of Arizona, as an officer of the Land Department, by virtue of his office and in view of the duties imposed by said act of 1860, possesses the inherent power to examine witnesses, etc., and do and perform all necessary acts incident to the full discharge of the duties thus imposed.

In the light of what has been said the Department is of opinion that the duty of investigating and determining, in the first instance at least, the character of the lands here involved rests upon the surveyor-general of Arizona; and also that such investigation should be conducted and determination made as the work of the survey progresses in the field.

It does not appear that the adjustment of the present controversy would be expedited by having a hearing for the purpose of determining the character of the land independently of and before the survey of the claim is commenced.

The order for a hearing heretofore made by the Department is therefore recalled and vacated, and upon proper deposits of the costs thereof, you will cause a survey of the claim to be made by the surveyor-general of Arizona, under the selection of June 17, 1863, in accordance with the principles and views herein set forth and expressed. Specific directions should be given that lands vacant, and
not known to be mineral at the date of said selection are to
349 be surveyed as subject to the grant, and that all lands ascertained by the surveyor-general to have been occupied, or known to be mineral, at such date, if any, within the boundaries of said selection, must be excluded from the survey as not being subject to the grant.

Before proceeding with the survey the surveyor-general will be required to give notice thereof for the period of sixty days by publication in two weekly newspapers published, and of general circulation, in the vicinity of the land and in one newspaper of general circulation throughout Arizona and published at the capital of the Territory, with a view to allowing all persons, if any, claiming an interest in the lands adverse to the grant claimants to be heard before

him at such stated times and places during the progress of the survey, as he may appoint, on the question of the known character of the land and whether the same was vacant at the date of the selection of June 17, 1863.

The former departmental decisions hereinbefore referred to, in so far as they may be in conflict with the views herein expressed, are hereby recalled and vacated.

The papers in the case are herewith returned.

Very respectfully, E. A. HITCHCOCK,
Secretary.

350 DEFENDANTS' EXHIBIT No. 37.

Counsel for defendants offer in evidence duly certified copy of a decision on file in the General Land Office dated June 30, 1900, signed by the Secretary of the Interior and addressed to the Commissioner of the General Land Office; and mark the same "Defendants' Exhibit No. 37."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 37 (except in so far as it may contain admissions against interest on the part of defendants and in favor of plaintiffs), on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a copy of a copy, and no foundation has been laid for the introduction of such a paper; for the further reason that it purports to be a copy of a decision of the Secretary of the Interior, which is reported in Land Decisions, and is not admissible as evidence; for the further reason that it is not evidence of the facts therein stated; and for the further reason that it is dated June 30, 1900, whereas title vested in the heirs of Baca April 9, 1864, and the jurisdiction of the Land Department over said lands then ceased.

351 "B." DEPARTMENT OF THE INTERIOR.
M. E. L. GENERAL LAND OFFICE.
WASHINGTON, D. C., *November* 23, 1910.

I hereby certify that the annexed copy of letter dated June 30, 1900, is a true and literal exemplification of the original in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

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I.

A. B. P. S. V. P. A. B. P.

2266-1899.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *June* 30, 1900.

W. V. D. Baca Float No. 3.

The Commissioner of the General Land Office.

SIR: By departmental decision of July 25, 1899 (29 L. D., 44), your office was directed to cause survey to be made of the grant known as the "Baca Float No. 3," by the surveyor-general of Arizona, under the selection or location of June 17, 1863. In that decision the Department held, among other things, that the duty of investigating and determining, in the first instance, the question of the known character of the lands embraced in said selection or location, at the time the same was made, and the question as to whether the lands were at that time vacant and subject to selection under the terms of the Baca grant, rests with the surveyor-general. Instructions were thereupon given to the effect that all persons alleging an interest in the lands adverse to the Baca claimants should be allowed to be heard before the surveyor-general, at such times and places as he may appoint, during the progress of the survey in the field, on the two questions: (1) as to the known character of the

353 lands at the date of said selection or location, and (2) as to whether the lands were then vacant.

Subsequently a petition was filed by R. E. Key and twenty-two others, alleged settlers on portions of the lands claimed under the selection of June 17, 1863, wherein it was in substance asked that a hearing be ordered with the view to allowing the petitioners an opportunity to show cause against the validity of said selection. Among the matters set forth in the petition was an allegation to the effect that large bodies of the lands within the exterior limits of said selection or location were, at the date thereof, embraced within certain Mexican grants alleged to have been made prior to the acquisition of title to that section of country by the United States, and that such alleged grants have recently been adjudged invalid by the courts.

By decision of December 11, 1899 (unreported), said petition was denied as to all the allegations thereof except the one just referred to. As to that allegation the Department said:

Questions therefore arise as to whether the lands included within these claimed grants were in a state of reservation under the concluding provision of section eight of the act of July 22, 1854 (10 Stat., 308), or otherwise, at the time of said selection or location, and if in a state of reservation at that time, whether they were subject to selection or location by the Baca Heirs and whether the subsequent judicial determination of the invalidity of said grants can operate to the advantage or benefit of said selection or location.

It is believed that these questions, resting as they do upon the

construction of certain laws and treaties, and not upon any disputed or uncertain matters of fact, should be determined before the survey of said selection or location is proceeded with, in order
354 that the lands within the said claimed Mexican grants may be included in or excluded from the survey, as may be right in the premises.

Directions were therefore given that the petitioners be allowed thirty days within which to present in writing a statement of their claim and contention with respect to said matters, and that the Baca claimants be allowed the same length of time after the filing of such statement to make answer thereto; all the papers to be thereupon returned to the Department for its consideration and action. Both the petitioners and the Baca claimants were served with notice of said decision.

A written statement of their claim and contention was accordingly filed by the petitioners, accompanied by a number of affidavits and other documentary evidence in support thereof. Copies of said statement and other papers were served on the Baca claimants, and an answer has been filed by counsel for one of said claimants. April 6, 1900, the papers were forwarded by your office to the Department as directed by the decision of December 11, 1899.

The Baca grant here in question is the third of the series of selections or locations authorized by section six of the act of June 21, 1860, 12 Stat., 71 (72), which provided as follows:

That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said (same) tract of land as is claimed by the town of Las Begas (Vegas), to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not
355 exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them; Provided, however, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

The grant embraces nearly one hundred thousand acres. The record indicates that the selection or location of June 17, 1863, conflicts with the claimed limits of two Mexican grants, one known as the Tumacacori and Calabazus grant, and the other as the San Jose De Sonoita grant. The indicated conflict with the former embraces over twenty thousand acres, and with the latter about four thousand three hundred acres.

By articles eight and nine of the treaty of Guadalupe Hidalgo (1848, 9 Stat., 229-30), and article five of the Gadsden treaty (1853, 10 Stat., 1035), it was provided that the property of Mexicans within the territory ceded to the United States by the Republic of Mexico, should be "inviolably respected," and that they and their heirs and grantees should be permitted "to enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States."

With the view to discharging the treaty obligations thus imposed, the Congress, by the eighth section of the act of July 22, 1854 (10 Stat., 308), provided:

That it shall be the duty of the Surveyor-General, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims
356 to lands under the laws, usages, and customs of Spain and Mexico; and, for this purpose, may issue notices, summons witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the Territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm bona fide grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act.

By act of August 4, 1854 (10 Stat., 575), it was further declared—

That, until otherwise provided by law, the territory acquired under the treaty with Mexico commonly known as the Gadsden treaty, be, and the same is hereby incorporated with the Territory of "New Mexico," subject to all the laws of said last named Territory.

By act of February 24, 1863 (12 Stat., 664), Arizona was carved out of the Territory of New Mexico, and organized as a new Territory, with its present boundaries, including the western portion of the lands ceded by the Gadsden treaty, wherein the Tumacacori and Calabazas, and San Jose De Sonoita grants are situated. The second section of the act provided for the appointment of a surveyor-
357 general and other officers for the new Territory. It was further provided that the "powers, duties, and the compensation" of said officers—

* * * shall be such as are conferred upon the same officers by the act organizing the Territorial government of New Mexico, which subordinate officers shall be appointed in the same manner and not exceed those created by said act; and acts amendatory thereto, together with all legislative enactments of the Territory of New Mexico not inconsistent with the provisions of this act are hereby extended to and continued in force in the said Territory of Arizona until repealed or amended by future legislation.

The contentions by the petitioners, substantially stated, are:

1. That the portions of the lands within the exterior limits of said selection or location of June 17, 1863, which were also within the claimed limits of said Mexican grants, were, at the date of said selection or location, in a state of reservation under the provisions of the eighth section of said act of July 22, 1854, and therefore not subject to selection under the granting act of June 21, 1860, supra;

2. That in view of such reservation the said selection or location is to that extent void; and

3. That the lands within said selection or location but not within either of said Mexican grants, are mineral in character, and for that reason not subject to the Baca grant.

In the answer filed on behalf of the Baca claimants it is contended, in substance and effect:

1. That it was not contemplated by the eighth section of the act of July 22, 1854, that the reservation thereby created in favor
358 of claimants under Mexican grants should become operative in any case until the filing with the surveyor-general of a petition for the confirmation of the grant, and that as no such petition was filed as to either of the grants in this case until after June 17, 1863, there could have been no reservation of lands on account thereof at that time;

2. That even if it be held that such reservation was in force in favor of the claimants under said Mexican grants, at the date of the Baca selection or location, the same has been abrogated as to all the lands within the claimed limits of the Tumacacori and Calabazas grant, by reason of said grant having been adjudged to be wholly invalid by the courts, and as to most of the lands within the claimed limits of the San Jose De Sonoita grant, by reason of that grant having been likewise adjudged to be in the greater part invalid; and that as the result of such abrogation, the Baca selection or location at once became operative upon the lands thus released from reservation so as to effectively include them within that grant; and

3. That the lands within the said Mexican grants were not occupied by the claimants thereunder or otherwise at the time of the selection or location of June 17, 1863, and were therefore vacant and subject to selection within the meaning of the act of June 21, 1860, supra.

The territory of New Mexico was originally organized under the act of September 9, 1850 (9 Stat., 446), prior to the Gadsden
359 treaty. The lands acquired by the United States under that treaty were, by the act of August 4, 1854, as we have seen, incorporated with the Territory of New Mexico "subject to all the laws" of that Territory, including, of course, the eighth section of the act of July 22, 1854. The last named act, as far as applicable to the Territory of New Mexico, was clearly amendatory of the original organization act of 1850, and to that extent was, therefore, "extended to and continued in force" in the new Territory of Arizona, by the act of February 24, 1863, supra, "until repealed or amended by future legislation." No such repealing or amendatory

legislation having been enacted at the time of the Baca selection or location of June 17, 1863, it follows that the provisions of said section eight of the act of July 22, 1854, were in full force and operation throughout the Territory of Arizona at that time.

The Tumacacori and Calabazas grant appears to have been based upon a certain instrument in writing dated April 18, 1844, "made and executed by the treasury department of Sonoro in compliance with the law of the Mexican Congress of the 10th of February, 1842, providing for the denouncement and sale of abandoned pueblos," running in the name of Don Francisco Alejo Aguilar, to whom said treasury department sold the land April 18, 1844. A petition for confirmation was filed June 9, 1864, with the surveyor-general of Arizona, who, in his report, recommended that the grant be confirmed. Proceedings looking to such confirmation, instituted in the Court of Private Land Claims established by the act of March 3, 1891 (26 Stat., 854), resulted in a decree by that court
360 rejecting the claim on the ground that the sale to Aguilar was void for want of authority in the treasury department of Sonoro to make it. On appeal to the Supreme Court the decree below was affirmed. (See Faxon v. United States, 171 U. S., 244.)

The title to the San Jose De Sonoita grant rests upon certain proceedings for the sale of the lands embraced therein, had under the Mexican government in 1821. A petition for its confirmation appears to have been filed with the surveyor-general December 30, 1879. A suit involving its validity, instituted in the Court of Private Land Claims, resulted in a decree by that court rejecting the claim on the ground that "the entire proceedings" upon which the title is based "were without warrant of law and invalid." On appeal to the Supreme Court, however, the decree below was in part reversed and the grant sustained to the extent of one and three-fourths sitios. (See Ely's Administrator v. United States, 171 U. S., 220.)

I. Were the lands within the limits of these Mexican grants "reserved from sale or other disposal by the government," under the eighth section of the act of July 22, 1854, at the date of the Baca selection or location of June 17, 1863?

The manifest purpose of the enactment of this legislation was the adoption of a means whereby effective steps might be taken as early as practicable looking to the discharge of the obligations im-
361 posed upon the United States by the treaty of 1848, with respect to property rights of Mexicans within the territory ceded by that treaty. A like purpose is equally manifest with respect to the lands ceded by the treaty of 1853, both in the act of August 4, 1854, whereby such newly ceded lands were "incorporated with the Territory of New Mexico, subject to all the laws" of that Territory, and in the later act of February 24, 1863, which extended said legislation to the new Territory of Arizona. It was made "the duty of the surveyor-general," under instructions from the Secretary of the Interior, "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico," within the ceded territory, and to make full report on all such claims as originated prior to the treaties of 1848 and 1853,

which report was to be submitted to Congress for its action with the view to the confirmation of all bona fide grants and thus giving effect to the stipulations of said treaties with respect thereto. It was further provided that "until the final action of Congress on such claims, all lands covered thereby" should be "reserved from sale or other disposal by the government."

The matters for investigation and report by the surveyor-general were Spanish or Mexican claims to lands, and the reservation for the benefit of such claims was to embrace "all lands covered thereby." There is nothing in the act indicative of a purpose on the part of Congress to postpone the effective operation of the reservation in any case to the time of the filing with the surveyor-general of a
362 petition for the confirmation of the claim, or to any other time. Indeed, there is no provision requiring the filing of any such petition with the surveyor-general or elsewhere. The natural and most reasonable interpretation of the language of the statute is that the reservation was to become immediately operative upon all lands within the ceded territory covered at the time by any Spanish or Mexican claim which originated prior to the treaty of cession. The purpose being that the lands should be reserved until final action could be had on the claim, it was quite as necessary that the reservation should be effective for such purpose before as after the commencement of proceedings under the statute by the surveyor-general. Otherwise the lands might have been disposed of by the government before the commencement of such proceedings and thus the very object of the statute would have been defeated.

It mattered not whether the claim was a valid one. If the lands were covered by a Spanish or Mexican claim they were to be reserved for the very purpose of affording an opportunity of investigating and determining the validity or invalidity of the claim. This investigation was to be made in the first instance by the surveyor-general but the action of that officer was not to be final. His report was to be submitted to Congress and there the means of final action were to be provided. To fully meet the purpose of the reservation it was necessary that it should at once become operative whenever and wherever lands were covered by a claim such as the statute describes.

363 The Department is therefore of the opinion that in so far as the lands here in controversy were covered by the Tumacacori and Calabazas claim, or by the San Jose De Sonoita claim, on June 17, 1863, such lands were at that time in a state of reservation under the eighth section of the act of July 22, 1854, and, for that reason, were not vacant lands subject to selection or location by the claimants under the Baca grant. While this conclusion is not in entire harmony with the views expressed by the Department in the case of Joseph Farr (24 L. D., 1), or with those in the case of the Tumacacori and Calabazas Grant (16 L. D., 408), it is the result of mature deliberation and is believed to be the correct conclusion.

II. The next question to be considered is whether the final judicial determination of the invalidity of the Tumacacori and Calabazas grant in its entirety, and of the invalidity of the San Jose De

Sonoita, in part, can operate to the advantage or benefit of the Baca grant claimants. In other words, the question is: Did the Baca selection of June 17, 1863, become operative upon the lands covered by said Mexican claims, upon, and to the extent of, their release from reservation by the final action of the courts, as aforesaid, so as to include the lands thus released within the Baca grant?

It is well here to observe that by express provision of the act of June 21, 1860, the right of selection thereby granted the Baca heirs was to continue in force during the period of three years from
364 the passage of the act and no longer. The language used is clear and explicit. The right to select was to continue for three years, and no longer. The three years during which selection could be made therefore expired with the expiration of the 21st day of June, 1863, and thereafter no right of selection under the act existed.

In the case of Shaw v. Kellogg (170 U. S., 312), the Supreme Court had under consideration selection No. 4 of the series authorized by said act of June 21, 1860, and in the discussion of the questions there presented the court said (page 332):

The grant was made in lieu of certain specific lands claimed by the Baca heirs in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere within the limits of New Mexico. The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico. We say 'lands then known to contain mineral,' for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and it would be an insult to the good faith of Congress to suppose that it did not intend that the title when it passed should pass absolutely, and not contingently upon subsequent discoveries.

It was under the authority of that case that the Department, in the decision herein of July 25, 1899, held that the time with reference to which the character of the land selected, whether mineral or not, is to be determined, is the date of the selection and not the
365 date of the survey of the claim.

The same authority would seem to be equally applicable and controlling as to the present controversy. If the time with reference to which the character of the land is to be determined, is the date of the selection, it is but reasonable that the same rule should be followed in the determination of the condition or state of the land, that is whether vacant, or reserved on account of an existing Spanish or Mexican claim. Besides, the selection was to be made within three years. "The title was then to pass," says the court; also, that it was intended by Congress "that the title when it passed should pass ab-

solutely." No selection or location could thereafter be made, nor could any lands as to which title did not pass under the grant within the three years, thereafter be included within, or as a part of, the grant. From this it necessarily follows that the Baca claimants are entitled under the selection or location of June 17, 1863, only to such lands as were then vacant, or free from reservation, and not known to be mineral. In other words, they are now entitled to have surveyed as within their grant only those lands as to which the title passed to them when the selection or location of June 17, 1863, was made. To the extent that the lands here in controversy shall be found by the surveyor-general to have been, at the date of said selection or location, within the claimed limits of the aforesaid Mexican grants, the same having been at that time, as has been shown, in a state of reservation for the benefit of the claimants under
366 those grants, the title did not pass by such selection or location to the Baca claimants, and it is accordingly held that such lands cannot be included within the survey of the Baca grant, but must be excluded therefrom.

III. The third contention by the petitioners, to which the affidavits filed by them principally relate, is not within the purview of the order of December 11, 1899, according them a hearing before the Department preliminary to the execution of the survey directed by the decision of July 25, 1899. In that decision plain directions were given as to the officer by whom, the manner in which, and the time with reference to which the character of the land, that is whether known mineral or not, is to be determined, and nothing further need be said on that subject.

IV. It is contended by the Baca people that the lands embraced within said Mexican grants were not occupied by the claimants thereunder or otherwise when the selection or location of June 17, 1863, was made, and that they were therefore at that date vacant lands subject to selection under the act of June 21, 1860. In so far as the contention is intended to negative the idea of actual occupancy of the lands at the time by the Mexican grantees, or their agents or others claiming under them, it presents a question which rests upon matters of fact, and the same answer as made to the third contention by the petitioners applies with equal force to this. It should be here repeated, however, so that there can be no mistake or misapprehension in the matter, that to the extent said lands were at the time covered by either of said Mexican claims, and for that reason
367 within the statutory reservation hereinbefore referred to, it can not be held that they were vacant lands within the meaning of that term as used in said act of June 21, 1860.

All the matters presented by the petition and answer having been disposed of, you are directed to cause the surveyor-general of Arizona to proceed with the survey of the Baca grant, in accordance with the views expressed and principles announced in this decision and in the former decision of July 25, 1899.

The papers in the case are herewith returned.

Very respectfully,

E. A. HITCHCOCK, *Secretary.*

368 DEFENDANTS' EXHIBIT No. 38.

Counsel for defendants offer in evidence a duly exemplified copy of an original letter on file in the General Land Office, dated September 29, 1900, addressed to the Commissioner of the General Land Office, signed by the Acting Secretary of the Interior; and mark the same "Defendants' Exhibit No. 38."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 38, on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a copy of a letter from an acting Secretary to the Commissioner of the General Land Office; for the further reason that no foundation has been laid for the introduction of a copy; for the further reason that it is not evidence of the facts therein stated; and for the further reason that it is dated September 29, 1900, whereas title vested in the heirs of Baca April 9, 1864, and the jurisdiction of the Land Department over said lands then ceased.

369 "B"
M. E. L.

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.
WASHINGTON, D. C., *November* 23, 1910.

I hereby certify that the annexed copy of letter dated September 29, 1900, is a true and literal exemplification of the original in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

H. W. SANFORD,
Recorder of the General Land Office.

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1900.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *September* 29, 1900.

W. V. D. Baca Float No. Three.

The Commissioner of the General Land Office.

SIR: A petition on behalf of James W. Vroom and John Watts has been filed in this Department wherein the petitioners, claiming to be the owners of Baca Float No. 3 situate in the Territory of Arizona, as selected June 17, 1863, request that they may be heard upon the matters presented in departmental decisions of July 25, 1899 (29 L. D., 44), and June 30, 1900 (30 L. D., 1897). These petitioners deny the claim of title heretofore and now asserted by others under conveyances from John S. Watts or his heirs, and assert

that under a conveyance or conveyances dated October 26, 1899, from the heirs of said John S. Watts the petitioners are the sole owners of the said Baca Float No. 3, as selected June 17, 1863. And these petitioners, while asserting that the question of the true ownership of said Float as so selected is not a matter within the jurisdiction of the land department, insist that they are entitled to be heard upon the controverted questions respecting said Float as to
371 selected notwithstanding the presentation and argument thereof by others heretofore and now asserting a claim of ownership under conveyances from the said John S. Watts or his heirs.

Without now acceding to any of the statements of fact or claims of the said petitioners, you will forthwith call upon Mr. Vroom for proof of his authority to represent John Watts, his co-petitioner, and for proof of the heirship of those who made the conveyance or conveyances under which these petitioners claim, and for proof of such conveyance or conveyances. You will serve upon these petitioners copies of the departmental decisions of July 25, 1899, and June 30, 1900; and you will accord the said petitioners full opportunity to inspect the records and papers in any way pertaining to said Baca Float No. 3, and especially the petition, statement and proofs presented by R. E. Key and others in opposition to said Float as so located. You will also notify the said petitioners, James W. Vroom and John Watts that they will be given until and including December 1, 1900, within which, in addition to submitting the proofs heretofore required, to present in writing their claim, contention and argument in the premises, and to serve copies of such claim, contention and argument upon opposing claimants, both those claiming under the Float and those claiming in opposition thereto, all of whom will be allowed until and including December 31, 1900, within which to make such showing as they may deem proper in opposition to the claim of the said petitioners. Thereupon all the papers will be transmitted by your office to the Department
372 for its consideration. In the meantime you will suspend further action under the said departmental decisions of July 25, 1899, and June 30, 1900.

Herewith is the petition of James W. Vroom and John Watts, together with a letter from Mr. Vroom, dated September 1, 1900.

Very respectfully,

F. L. CAMPBELL,
Acting Secretary.

373 DEFENDANTS' EXHIBIT No. 41.

Counsel for defendants offer in evidence duly certified copy of a decision on file in the General Land Office dated March 5, 1901, signed by the Secretary of the Interior and addressed to the Commissioner of the General Land Office; and mark the same "Defendants' Exhibit No. 41."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 41 (except in so far as it may contain admissions

against interest on the part of defendants and in favor of plaintiffs), on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a copy of a copy, and no foundation has been laid for the admission of such a paper; for the further reason that it purports to be a copy of a decision of the Secretary of the Interior, which is reported in Land Decisions, and is not admissible as evidence; for the further reason that it is not evidence of the facts therein stated; and for the further reason that it is dated March 5, 1901, whereas title vested in the heirs of Baca April 9, 1864, and the jurisdiction of the Land Department over said lands then ceased.

374 "B" M. E. L.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 23, 1910.

I hereby certify that the annexed copy of letter dated March 5, 1901, is a true and literal exemplification of the original in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

H. W. SANFORD,
Recorder of the General Land Office.

375 E.

S. V. P. A. B. P. A. B. P.

2266–1899.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *March* 5, 1901.

W. V. D. Baca Float No. 3.

The Commissioner of the General Land Office.

SIR: September 4, 1900, James W. Vroom filed in this Department a petition on behalf of himself and John Watts, claiming that the petitioners are the owners of Baca Float No. 3, situate in the Territory of Arizona, as selected June 17, 1863, and requesting that they be heard upon the matters presented and considered in departmental decisions of July 26, 1899 (29 L. D., 44), and June 30, 1900 (30 L. D., 97).

The petitioners deny the claim of title asserted by other parties under conveyances from John S. Watts or his heirs, and assert that under a conveyance from the heirs of said John S. Watts to the petitioner, John Watts, dated October 26, 1899, and a conveyance from said John Watts to the petitioner, James W. Vroom, dated December 20, 1899, they are jointly the exclusive owners of said Baca Float No. 3, as selected June 17, 1863.

While asserting that the question of the true ownership
376 of said Float as so selected is not a matter within the jurisdiction of the land department, these petitioners insist that

they are entitled to be heard upon the controverted questions respecting said Float as so selected, notwithstanding the presentation and argument of said questions by other parties heretofore and now asserting claim of ownership under conveyances from said John S. Watts or his heirs.

September 29, 1900, an order was made by this Department directing that the petitioners be notified that they would be allowed until December 1, 1900, within which, after submitting certain preliminary proofs required by said order, to present in writing their claim, contention and argument in the premises, and to serve copies of the same upon opposing claimants, both those claiming under the Float and those claiming in opposition thereto, all of whom were to be allowed until and including December 31, 1900, within which to make answer to the claim and contention of the petitioners, should they so desire; whereupon the papers were to be transmitted by your office to this Department for its consideration. In the meantime further action under the departmental decisions of July 25, 1899, and June 30, 1900, was suspended.

Under the said departmental order the petitioner, James W. Vroom, filed a printed brief of argument in support of the claim and contention of himself and his co-petitioner John Watts, and a brief in answer thereto was filed by counsel for the parties heretofore and now claiming in opposition to the said float.

377 February 9, 1900, your office transmitted the papers to the Department, and they are now here for consideration. The brief of Vroom is accompanied by certain evidence touching his authority to represent his co-petitioner, Watts, and also touching the heirship of the parties under whom the petitioners claim. Both briefs appear to have been served as required by the aforesaid departmental order.

The float in question was selected under the act of June 21, 1860 (12 Stat., 71-2), which provided as follows:

That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said (same) tract of land as is claimed by the town of Las Begas (Vegas), to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them; Provided, however, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

By the departmental decision of July 25, 1899, supra, it was held that the owners of the float are bound by the selection of June 17, 1863, and can not take under the subsequent selection of April 30, 1866; that the time with reference to which the character of the land selected, whether vacant and not mineral, is to be determined, is the date of the selection, and not the date of the approval of the survey of the claim; that the duty of investigating and determining,

in the first instance, the character of the land selected,
378 whether vacant and not mineral, as of the date mentioned, rests upon the surveyor-general of Arizona; and that such investigation should be conducted and determination made as the work of the survey progresses in the field. Directions were thereupon given for the survey of the claim in accordance with the views thus expressed.

Subsequently a petition was filed in the Department by R. E. Key and others, claiming, as alleged settlers under the public land laws, in opposition to said Float and to said selection of June 17, 1863. Among the averments of the petition was one to the effect that large bodies of the lands within the exterior limits of said selection were, at the date thereof, embraced within the claimed limits of two Mexican grants, one known as the Tumacacori and Calabazas grant, and the other as the San Jose De Sonoita grant; and it was contended that as to all lands within the exterior limits of said selection which were also within the claimed limits of either of said Mexican grants, the same were, at the date of said selection, reserved from sale or other disposal by the government, under the provisions of section eight of the act of July 22, 1854 (10 Stat. 308), and, therefore, not subject to selection under the said act of June 21, 1860.

By the departmental decision of June 30, 1900, supra, it was held that in so far as the lands in question were covered by the Tumacacori and Calabazas claim, or by the San Jose De Sonoita claim, on June 17, 1863, such lands were at that time in a state of reservation under the aforesaid act of July 22, 1854, and, for that reason,
379 were not vacant lands subject to selection under the Baca grant; that the subsequent decisions of the Supreme Court holding the Tumacacori and Calabazas claim to be invalid (Faxon v. United States, 171 U. S., 244), and the decision of the same court sustaining the San Jose De Sonoita claim in part only (Ely's Admn. v. United States, 171 U. S., 220), did not operate to the advantage or benefit of the Baca claimants; and that to the extent the lands in controversy shall be found by the surveyor-general to have been, on June 17, 1863, within the claimed limits of either of said Mexican grants, the same can not be included in the survey of the Baca grant but must be excluded therefrom.

The present petitioners contend that by the official acts of the register and receiver, of the surveyor-general, and of the Commissioner of the General Land Office, done and performed in the year 1864, with respect to the selection of June 17, 1863, all the lands embraced within the limits of the selection were "definitely and finally determined by the government" to be vacant and not mineral; that the title to the selected tract, as entirety, thereby became vested in the Baca heirs as a complete grant under the act of June 21, 1860; and that their right to a survey of the same, and to a patent or other evidence of title thereto, became absolute. It is accordingly insisted that by the decision of July 25, 1899, supra, the Department erred in holding it to be the duty of the surveyor-general, during the progress of the survey directed by that decision to be

made, to investigate and determine the known character of
380 the lands, and whether the same were vacant or not, at the date of said selection.

The official acts in the premises, by the several officers mentioned, to which attention is specifically invited, are as follows:

(1) The certificates of the register and receiver at Santa Fe, New Mexico, dated March 25, 1864, in which it was in substance stated that the lands embraced in the selection of June 17, 1863, were unsurveyed, and "vacant and not mineral," so far as the records of their office showed.

(2) A communication addressed to your office by the surveyor-general of New Mexico, dated April 2, 1864, wherein it was stated:

I have to acknowledge the receipt on my return to Santa Fe from Arizona, of your letter of 18th July 1863. In reply I have to state that, there is no evidence in the office of the Surveyor General of New Mexico, that the tract of land located by the heirs of Luis Maria Cabeza de Baca, designated as location No. three, contains any mineral, or that it is occupied. There have been no public surveys made in the neighborhood of said tract, and there is no record of, or concerning the land in question in the Surveyor General's office, nor—as I believe—in the office of the Register or Receiver of the Land Office of New Mexico.

As I am personally unacquainted with that region of country, I cannot certify that the land in question is "vacant and not mineral" or otherwise. Those facts can only be determined by actual examination and survey.

(3) A letter addressed by your office to the surveyor-general of Arizona, April 9, 1864, wherein authority and instructions were given for the survey of the selection of June 17, 1863.

It is insisted that the order of survey thus given, in view
381 of the stated earlier proceedings by the register and receiver and the surveyor-general, amounted to an approval by your office of said selection; that such approval was conclusive, imported a perfect title, and is binding upon the land department; that "it was the final determination of the government that the location, as a whole, was vacant and not mineral."

In this connection it is important to note that in the letter of your office, of July 18, 1863, referred to by the surveyor-general in his said communication of April 2, 1864, it was stated that before the selection could be approved by your office it was necessary that a statement from the surveyor-general and register and receiver, that the land selected "is vacant and not mineral," should be furnished.

In your office letter of April 9, 1864, authorizing a survey of the claim, reference was made to certain papers enclosed therewith as showing the selection of June 17, 1863, and the approval thereof by the surveyor-general of New Mexico, as of June 18, 1863. The date given was evidently a mistake. The approval referred to was contained in a certificate of the surveyor-general, of even date with the selection, or location as it was sometimes called, and was in these words: "Said location is hereby approved." Nothing was said in the

certificate with respect to the character of the lands selected, or as to whether they were vacant or occupied.

At the time the survey was authorized by your office no
382 certificate of the surveyor-general that the lands selected were vacant and not mineral had been furnished. Up to that time, the only statements received from that officer, bearing upon the question of the state or character of the lands, were those contained in his aforesaid communication of April 2, 1864, to the effect that there was no evidence in his office on the subject; that the public surveys had not extended to the neighborhood of the selected lands; that there was not in his office, nor in the office of the register and receiver as he believed, any record of or concerning the lands; that he was personally unacquainted with that region of country, and could not certify that the lands selected were vacant and not mineral, or otherwise; and that "those facts can only be determined by actual examination and survey." It was not stated in the letter authorizing the survey that your office approved the selection. The former proceedings in the premises were apparently accepted as sufficient to justify the order of survey, but that was all. The letter of July 18, 1863, wherein it was held that before the selection could be approved by your office, a statement from the surveyor-general and register and receiver that the selected land "is vacant and not mineral" must be furnished, was not recalled or in any way modified.

In the case of Shaw v. Kellogg (170 U. S., 312) the Supreme Court had under consideration selection No. 4 of the series authorized by said act of June 21, 1860, and with respect to the question now being considered it was there said (pp. 333, 334):

383 "How was the character of the land to be determined, and by whom? The surveyor general of New Mexico was directed to make survey and location of the lands selected. Upon that particular officer was cast the specific duty of seeing that the lands selected were such as the Baca heirs were entitled to select. It is not strange that he was the one named; for, in the original act of 1854, which made provision for the examination of these various claims, the duty of such examination was cast upon the same officer, and he was there required "to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico; and, for this purpose, may issue notices, summon witnesses, administer oaths and do and perform all other necessary acts in the premises," and it was upon his report that Congress acted. Further, he was the officer who, by virtue of his duties, was most competent to examine and pass upon the question of the character of the lands selected. We do not mean that Congress thereby created an independent tribunal outside of and apart from the general Land Department of the Government. On the contrary, the act of 1854 provided that he should act under instructions from the Secretary of the Interior, and so undoubtedly in proceeding to make survey and location as required by section 6 of the act of 1860, he was still subject to the control and direction of the Land Department; but while he was not authorized by this section to act in defiance or independently of the Land Department he was the particular officer

charged with the duty of making survey and location, and it was for him to say, in the first instance at least, whether the lands so selected, and by him surveyed and located, were lands vacant and non-mineral. This is in accord with the views of the Land Department, as appears from the official letter of June 28, 1884, written in response to an application for the right to make mineral locations within the tract, in which the Commissioner, after stating what had taken place, added: You will see by the foregoing that the land in question was determined, in 1864, by the surveyor general, whose province and duty it was, to be non-mineral: the location was then perfected and the title passed."

In that case it appeared that the selection (No. 4) had been surveyed in November, 1863. December 5, 1863, the surveyor general certified that "from good and sufficient evidence I am perfectly satisfied that the land" selected and surveyed "is not mineral and
384 is vacant." A like certificate of the same date was furnished by the register and receiver. The survey was approved by the surveyor general March 18, 1864, and he thereupon forwarded a transcript of the field notes and plat of the survey, with his approval entered thereon, to your office, where they were subsequently received and filed. In the official letter of June 28, 1884, referred to and quoted from by the Court, in the course of its decision, it was also said:

In the case of location No. 4, in question, the surveyor general having first ascertained and determined that the land selected was vacant and non-mineral, surveyed and located it, and approved the plat of the location, March 18, 1864, and this approved plat, in the absence of any provision of law for the issuing of patent, became the evidence of title in the owner of the land so located.

In the case now under consideration the order of survey of April 9, 1864, was never executed. The selection (No. 3) still remains unsurveyed, and there has never been an ascertainment and determination by the surveyor-general that the lands selected were vacant and not mineral.

In the decision of July 29, 1899, supra, the Department, speaking of the act of 1854, referred to by the court in the Shaw-Kellogg case, and of an act amendatory thereof passed in 1870, and of the subsequent repeal of certain provisions of both the original and amendatory acts, and of the question of the effect of such repeal upon the duties of the surveyor-general in the matter of the survey of the selection in question, said:

The act of 1854 thus referred to is the act of July 22, 1854
385 (10 Stat., 308), which, among other things, established the office of surveyor-general of New Mexico, and, in section 8 thereof, which was still in force when the survey in that case was made, defined the powers and duties of that officer as stated by the court. By a later act, to wit, the act of July 15, 1870 (16 Stat., 291, 304), it was provided:

"That it shall be the duty of the surveyor-general of Arizona, "under such instructions as may be given by the Secretary of the "Interior, to ascertain and report upon the origin, nature, charac-

" ter, and extent of the claims to lands in said Territory, under the " laws, usages, and customs of Spain and Mexico; and for this pur- " pose he shall have all the powers conferred, and shall perform all " the duties enjoined upon the surveyor-general of New Mexico by " the eighth section of an act * * * approved July twenty- " second, eighteen hundred and fifty-four."

While by the act of March 3, 1891 (26 Stat., 854, 861), establishing a court for the settlement of unconfirmed private land claims, said section 8 of the act of 1854, and all amendments or extensions thereof (which would include said extension act of July 15, 1870) were repealed, yet there has been no repeal of the specific provision of the act of 1860, placing the duty of surveying and locating the lands selected thereunder upon the surveyor-general. True the officer named was the surveyor-general of New Mexico, but the Territory of Arizona had not then been formed, and there can be no doubt that the surveyor-general of that Territory subsequently established, within whose present jurisdiction the lands are situated, lawfully succeeds with reference to the claim here in question to the duties imposed by said act upon the surveyor-general of New Mexico.

Nor can there be any doubt that the surveyor-general of Arizona, as an officer of the Land Department, by virtue of his office and in view of the duties imposed by said act of 1860, possesses the inherent power to examine witnesses, etc., and do and perform all necessary acts incident to the full discharge of the duties thus imposed.

The act of 1860 made it the duty of the surveyor-general to make survey and location of the selected lands. In the Shaw-Kellogg case the Supreme Court held that, while the surveyor-general was not authorized to act—

in defiance or independently of the land department, he was the particular officer charged with the duty of making the sur-
386 vey and location, and it was for him to say, in the first instance at least, whether the lands so selected, and by him surveyed and located, were lands vacant and non-mineral.

The duty thus enjoined upon the surveyor-general has never been discharged with respect to the selection herein question. There has never been a "final determination by the government that the location, as a whole, was vacant and not mineral," as contended by the petitioners. In this respect the proceedings had in the present case were materially different from the proceedings in the case of selection No. 4, to which frequent reference is made in the petitioners' brief. In that case the selection was surveyed in November, 1863. The surveyor-general certified in December, 1863, "upon good and sufficient evidence," that the lands selected and surveyed were not mineral and were vacant, and the survey was approved by that officer in March, 1864. As was said in your office letter of June 28, 1884, referred to with approval by the Supreme Court in Shaw v. Kellogg, the land "was determined, in 1864, by the surveyor-general, whose province and duty it was, to be non-mineral; the location was then perfected and the title passed." In the present case the selection has never been surveyed, nor has there ever been an

ascertainment and determination by the surveyor-general as to whether the lands selected were vacant and not mineral, or otherwise.

Until there has been a survey of the selection, and a determination by the proper officer of the government as to whether the lands selected were vacant, and whether or not they were known to be
387 mineral, at the date of the selection, final action by the government can not be had in the premises. The surveyor-general of Arizona is the officer whose duty it is to make the survey, and it will be for him to say, in the first instance, whether the lands were vacant and not known to be mineral at the date of the selection. The instructions for the survey, given by the Department in its decision of July 25, 1899, are in accord with these views. There is therefore no error in that decision as contended.

The petitioners also contend that by the decision of June 30, 1900, the Department erred in holding that in so far as the lands embraced by the selection of June 17, 1863, shall be found by the surveyor-general to have been, at the date of the selection, within the claimed limits of either of the Mexican grant claims known as the Tumacacori and Calabazas grant, and the San Jose De Sonoita grant such lands were in a state of reservation under the act of July 22, 1854, and for that reason not subject to selection under the act of June 21, 1860.

The record indicates a conflict between the selection and each of said Mexican claims.

The provisions of the act of 1854 which relate to the present controversy are contained in the eighth section. This section, together with a brief history of the act and of the subsequent legislation extending the provisions in question to the Territory of Arizona, were stated in the former decision, as follows:

By articles eight and nine of the treaty of Guadalupe Hidalgo (1848, 9 Stat., 229-30), and article five of the Gadsden treaty
388 (1853, 10 Stat., 1035), it was provided that the property of Mexicans within the territory ceded to the United States by the Republic of Mexico, should be "inviolably respected," and that they and their heirs and grantees should be permitted "to enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States."

With the view to discharging the treaty obligations thus imposed, the Congress, by the eighth section of the act of July 22, 1854 (10 Stat., 308), provided:

"That it shall be the duty of the surveyor-general, under such "instructions as may be given by the Secretary of the Interior, to "ascertain the origin, nature, character, and extent of all claims "of lands under the laws, usages, and customs of Spain and Mexico; "and, for this purpose, may issue notices, summons witnesses, ad-"minister oaths, and do and perform all other necessary acts in "the premises. He shall make a full report on all such claims as "originated before the cession of the territory to the United States by "the treaty of Guadaloupe Hidalgo, of eighteen hundred and forty-"eight, denoting the various grades of title, with his decision as to

" the validity or invalidity of each of the same under the laws, " usages, and customs of the country before its cession to the United " States; and shall also make a report in regard to all pueblos ex- " isting in the territory, showing the extent and locality of each, " stating the number of inhabitants in the said pueblos, respectively, " and the nature of their titles to the land. Such report to be made " according to the form which may be prescribed by the Secretary " of the Interior; which report shall be laid before Congress for such " action thereon as may be deemed just and proper, with a view to " confirm bona fide grants, and give full effect to the treaty of " eighteen hundred and forty-eight between the United States and " Mexico; and, until the final action of Congress on such claims, all " lands covered thereby shall be reserved from sale or other disposal " by the government, and shall not be subject to the donations " granted by the previous provisions of this act."

By act of August 4, 1854 (10 Stat., 575), it was further declared—

"That, until otherwise provided by law, the territory acquired " under the treaty with Mexico commonly known as the Gadsden " treaty, be, and the same is hereby incorporated with the Territory " of 'New Mexico,' subject to all the laws of said last named Ter- " ritory."

By act of February 24, 1863 (12 Stat., 664), Arizona was carved out of the Territory of New Mexico, and organized as a new
389 Territory, with its present boundaries, including the western portion of the lands ceded by the Gadsden treaty, wherein the Tumacacori and Calabazas, and San Jose De Sonoita grants are situated. The second section of the act provided for the appointment of a surveyor-general and other officers for the new Territory. It was further provided that the "powers, duties, and the compensation" of said officers—

" shall be such as are conferred upon the same officers by the act " organizing the territorial government of New Mexico, which subor- " dinate officers shall be appointed in the same manner and not ex- " ceed in number those created by said act; and acts amendatory " thereto, together with all legislative enactments of the Territory " of New Mexico not inconsistent with the provisions of this act are " hereby extended to and continued in force in the said Territory of " Arizona until repealed or amended by future legislation."

* * * * * * *

The territory of New Mexico was originally organized under the act of September 9, 1860 (9 Stat., 446), prior to the Gadsden treaty. The lands acquired by the United States under that treaty were, by the act of August 4, 1854, as we have seen, incorporated with the Territory of New Mexico "subject to all the laws" of that Territory, including, of course, the eighth section of the act of July 22, 1854. The last named act, as far as applicable to the Territory of New Mexico, was clearly amendatory of the original organization act of 1850, and to that extent was, therefore, "extended to and continued in force" in the new Territory of Arizona, by the act of February 24, 1863, supra, "until repealed or amended by future legislation."

No such repealing or amendatory legislation having been enacted at the time of the Baca selection or location of June 17, 1863, it follows that the provisions of said section eight of the act of July 22, 1854, were in full force and operation throughout the Territory of Arizona at that time.

It is contended by these petitioners that the clause of said section eight of the act of 1854, which provides that "until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government," etc., refers only to such claims "as had been filed with and passed upon by the surveyor-general, and by him reported to Congress." As no
390 petition for confirmation was filed with the surveyor-general on behalf of either the Tumacacori and Calabazas claim, or the San Jose De Sonoita claim, until after the Baca selection of June 17, 1863, it is accordingly insisted that there could have been no reservation under said section eight on account of those claims, at the date of said selection.

On this subject the Department, in its former decision, after giving a brief history of each of said Mexican claims, and of the proceedings had with respect thereto before the surveyor-general and the courts, stated and held as follows:

Were the lands within the limits of these Mexican grants "reserved from sale or other disposal by the government," under the eighth section of the act of July 22, 1854, at the date of the Baca selection or location of July 17, 1863?

The manifest purpose of the enactment of this legislation was the adoption of a means whereby effective steps might be taken as early as practicable looking to the discharge of the obligations imposed upon the United States by the treaty of 1848, with respect to property rights of Mexicans within the territory ceded by that treaty. A like purpose is equally manifest with respect to the lands ceded by the treaty of 1853, both in the act of August 4, 1854, whereby such newly-ceded lands were "incorporated with the Territory of New Mexico, subject to all the laws" of that Territory, and in the later act of February 24, 1863, which extended such legislation to the new Territory of Arizona. It was made "the duty of the surveyor-general," under instructions from the Secretary of the Interior, "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico," within the ceded territory, and to make full report on all such claims as originated prior to the treaties of 1848 and 1853, which report was to be submitted to Congress for its action with the view to the confirmation of all bona fide grants and thus giving effect to the stipulations of said treaties with respect thereto. It was further provided that "until the final action of Congress on such
391 claims, all lands covered thereby" should be "reserved from sale or other disposal by the government."

The matters for investigation and report by the surveyor-general were Spanish or Mexican claims to lands, and the reservation for the benefit of such claims was to embrace "all lands covered thereby." There is nothing in the act indicative of a purpose on the part of

Congress to postpone the effective operation of the reservation in any case to the time of the filing with the surveyor-general of a petition for the confirmation of the claim, or to any other time. Indeed, there is no provision requiring the filing of any such petition with the surveyor-general or elsewhere. The natural and most reasonable interpretation of the language of the statute is that the reservation was to become immediately operative upon all lands within the ceded territory covered at the time by any Spanish or Mexican claim which originated prior to the treaty of cession. The purpose being that the lands should be reserved until final action could be had on the claim, it was quite as necessary that the reservation should be effective for such purpose before as after the commencement of proceedings under the statute by the surveyor-general. Otherwise the lands might have been disposed of by the government before the commencement of such proceedings and thus the very object of the statute would have been defeated.

It mattered not whether the claim was a valid one. If the lands were covered by a Spanish or Mexican claim they were to be reserved for the very purpose of affording an opportunity of investigating and determining the validity or invalidity of the claim. This investigation was to be made in the first instance by the surveyor-general but the action of that officer was not to be final. His report was to be submitted to Congress and there the means of final action were to be provided. To fully meet the purpose of the reservation it was necessary that it should at once become operative whenever and wherever lands were covered by a claim such as the statute describes.

The views thus expressed were the result of mature deliberation. They furnish a complete answer to the contention of the petitioners on the subject, and further discussion would therefore accomplish no good purpose. Nothing has been presented which shakes the confidence of the Department in the correctness of the principle announced.

The further contention is made, however, with respect the
392 San Jose De Sonoita grant, that—

This grant was one of quantity within larger exterior boundaries, and in such cases the United States government succeeded to the right of the Mexican government of locating the quantity granted in such part of the larger tract as it saw fit, and the land other than that necessarily reserved during the examination of the validity of the grant was at the disposal of the government.

In October, 1892, a suit involving the validity of said grant was brought by the United States in the Court of Private Land Claims (established by the act of March 3, 1891, 26 Stat., 854) against certain parties, one of whom claimed title under the grant, and the others claimed some interests in the lands. The Court of Private Land Claims rejected the grant on the ground that "the entire proceedings" upon which title was claimed "were without warrant of law and invalid." On appeal to the Supreme Court the decree below was reversed and the grant was sustained to the extent of one and three-quarter sitios (Ely's Administrator v. United States, 171 U. S., 220). In the course of its decision, the Court, after reaching

the conclusion "that this grant was one which, at the time of the cession of 1853 was recognized by the government of Mexico as valid, and therefore one which it was the duty of this Government to respect and enforce," further said:

We pass, therefore, to a consideration of the second question, and that is, the extent of the grant. It is claimed by the appellant that the grant should be sustained to the extent of the outboundaries named in the survey. He insists that the accepted rule of
393 the common law is, that metes and bounds control area; that a survey was in fact made and possession given according to such survey, and that although it now turns out that the area within the survey is largely in excess of the amount applied and paid for, the grant must be held effective for the area within the survey.

We had occasion to examine this question in Ainsa v. United States, 161 U. S., 208, 229, and there said:

"So monuments control courses and distances, and courses and "distances control quantity, but where there is uncertainty in "specific description, the quantity named may be of decisive weight, "and necessarily so if the intention to convey only so much and no "more is plain."

We think this case comes within the rule thus stated. The defendant, in his answer, alleges that the grant comprises 12,147.69 acres, while counsel for the Government say that the measurements given by the surveyor make the area 22,925.87 acres. The amount of land appraised, advertised, sold and auctioned off was one and three quarter sitios (7591.61 acres). While, of course, any slight discrepancy between the area of the survey and that ostensibly sold might be ignored, yet the difference between the amount which was understood to have been sold and the amount now found to be within the limits of the survey is so great as to suggest the propriety of the application of the rule laid down in Ainsa v. United States, supra. There can be no doubt from the record of the proceedings that one and three quarter sitios was all that the purchaser supposed he had purchased, all that the intendant supposed he had sold, and all that was advertised or paid for. The original petition, after stating that there was a place known as San Jose De Sonoita, declared that the petitioner registered "in the aforesaid place two sitios of land," which he desired to have surveyed, and to pay therefor the just price at which it might be valued. The petition, therefore, was not for any tract known by a given name, but for a certain amount of land in such place.

While it thus appears that the Court held the grant to be "for a certain amount of land," and not "for any tract known by a given name," and sustained it only as to the amount of land originally applied for and for which payment had been made, it also appears that a tract "largely in excess of the amount applied
394 and paid for" was embraced in the survey of the grant. This survey was made by the Mexican authorities in 1821, and it would seem that possession was given according to such survey. At all events, title was claimed under the grant to the extent of the outboundaries named in the survey. It was insisted that the given metes and bounds should control area, and that the grant should be

upheld for the full area within the survey. Thus surveyed, with an assertion of right and title according to the survey, the grant was clearly a claim to lands within the meaning of section eight of the act of 1854, to the extent of the outboundaries named in the survey. And so the claim continued until finally reduced in quantity by the Supreme Court, as has been shown.

This case differs materially from the cases of United States v. McLaughlin (127 U. S., 428) and Carr v. Quigley (149 U. S., 652), referred to in the brief of the petitioners. The first-named case was a suit brought by the United States against the Central Pacific Railroad Company and others. The object of the suit was to cancel and annul a patent issued to the railroad company for certain lands situate in the State of California, on the ground that the patent was issued without authority of law for the reason that the lands patented were within the outboundaries of a certain Mexican grant claim known as the Moquelamos grant, and were therefore reserved on account of that grant at the date when the railroad company's right attached under the act of Congress pursuant to which the patent was issued.

The claimed reservation in that case was based upon the act
395 of March 3, 1851 (9 Stat., 631), which made provision for the ascertainment and settlement of private land claims in the State of California, through a tribunal established for that purpose. One of the consequences of the passage of that act was, as held in the case of Newhall v. Sanger (92 U. S., 761, 763-5), "that no title could be initiated under the laws of the United States to lands covered by a Spanish or Mexican claim, until it was barred by lapse of time or rejected." With respect to the character of the grant in question the court said:

The Moquelamos grant belongs to that class of grants which may properly be called floats; that is, grants of a certain quantity of land to be located within the limits of a larger area. Mexican grants were of three kinds: (1) grants by specific boundaries, where the donee is entitled to the entire tract, whether it be more or less; (2) grants of quantity, as of one or more leagues within a larger tract described by what are called outside boundaries, where the donee is entitled to the quantity specified, and no more; (3) grants of a certain place or rancho by name, where the donee is entitled to the whole tract according to the boundaries given, or if not given, according to its extent as shown by previous possession. Higueras v. United States, 5 Wall., 827, 834. In the first and third kinds, the claim of the grantee extends to the full limits of the boundaries designated in the grant or defined by occupation; but in the second kind, a grant of quantity only, within a larger tract, the grant is really a float, to be located by the consent of the government before it can attach to any specific land, like the land warrants of the United States. A float may be entitled to location either on any public lands in the United States, or only in a particular State or Territory, or within a more circumscribed region or district. Its character remains the same. The present grant is one of this kind.

It was thereupon held that only the float—the quantity of land granted and to be located within the larger area—was actually
396 reserved during the examination of the grant, and that the surplus or remainder of such larger area, over and above the

quantity necessary to satisfy the float, was at the disposal of the government as part of the public domain. The case of Carr v. Quigley was similar to the McLaughlin case.

Whatever may have been the character of the San Jose De Sonoita grant as originally made, it certainly was not an unlocated float, of the kind described in the McLaughlin case, at the date of the Baca selection here in question. Its then condition was not that of a mere float to be located "within a larger tract described by what are called outside boundaries," before it could "attach to any specific land, like the land warrants of the United States." The grant had been surveyed and located prior to the cession of 1853, and at the time of the cession, and thereafter, the right of possession and title under the grant were asserted and claimed according to the survey and location. It turned out that the area within the survey was too largely in excess of the amount of land actually purchased and paid for to allow the application of the common law rule that metes and bounds control area, and it was therefore determined, not that the grant is a float yet to be located, but that the measurements of the original survey and location should be reduced so as to make the area of the tract already located conform to that actually purchased and paid for.

It is instructive to note, in this connection, what was said by the Supreme Court in the case involving the validity of said
397 grant (171 U. S., 220, 241), upon the question as to how the real tract granted might be ascertained and established. We quote as follows:

Many things may exist by which the real tract granted can be established. In the case before us, if it be possible to locate the central point from which according to the report the survey was made (and we judge from the testimony that it is possible) the actual grant can be established by reducing each measurement therefrom to such an extent as to make the area that of the tract purchased and paid for. If the outboundaries disclose a square or any rectangular figure, the excess of area suggests simply a carelessness of measurement, and can be corrected by a proportionate reduction in each direction. In other cases, the location of the waterway, the configuration of the ground, may be such as to enable a court of equity by its commissioner or master to determine exactly what was intended to pass under the grant.

After a careful consideration of the whole matter the Department finds no reason for disturbing the action taken in either of the decisions complained of. The petition is accordingly denied.

The papers are herewith returned.

Very respectfully,

E. A. HITCHCOCK, *Secretary.*

398 DEFENDANTS' EXHIBIT No. 42.

Counsel for defendants offer in evidence duly certified copy of a letter on file in the General Land Office, addressed to the Commissioner thereof, signed by the Secretary of the Interior and dated June 1, 1901; and mark the same "Defendants' Exhibit No. 42."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 42, on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a copy of a copy, and no foundation has been laid for the introduction of such a paper; for the further reason that it is not evidence of the facts therein stated; and for the further reason that it is dated June 1, 1901, whereas title vested in the heirs of Baca April 9, 1864, and the jurisdiction of the Land Department over said lands then ceased.

399 "B" M. E. L.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 23, 1910.

I hereby certify that the annexed copy of letter dated June 1, 1901, is a true and literal exemplification of the original in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD.
Recorder of the General Land Office.

400 F. S. V. P. A. B. P. A. B. P.

DEPARTMENT OF THE INTERIOR,
2266–1899. WASHINGTON, *June* 1, 1901.

W. V. D. Baca Float No. 3.

Motion for Review.

The Commissioner of the General Land Office.

SIR: H. W. King, one of the claimants under the grant known as Baca Float No. 3, has filed a motion for review of departmental decision of June 30, 1900 (30 L. D., 97), wherein it was held that lands within the section of country ceded to the United States by the treaty of Guadalupe Hidalgo and the Gadsden treaty, covered by Spanish or Mexican claims, were, by the eighth section of the act of July 22, 1854 (10 Stat., 308), and the act of August 4, 1854 (10 Stat., 575), reserved from other disposition until the validity or invalidity of such claims was finally determined; and that to the extent that the lands embraced by the selection or location of June 17, 1863, of said Baca Float No. 3, shall be found to have been, at the date of said selection or location, within the claimed limits of either
401 of the Mexican grants known as the Tumacacori and Calabazas grant, and the San Jose De Sonoita grant, such lands were not subject to selection or location under said Baca grant and cannot be included in the survey thereof, but must be excluded therefrom.

No questions are raised by the motion which were not presented to and carefully considered by the Department when the decision

complained of was rendered, and no reason is shown for disturbing that decision.

The motion is therefore denied, and the same is herewith returned for the files of your office.

Very respectfully,

E. A. HITCHCOCK,
Secretary.

402 DEFENDANTS' EXHIBIT No. 43.

Counsel for defendants offer in evidence duly certified copy of a letter on file in the General Land Office, dated April 16, 1902, signed by the Secretary of the Interior and addressed to the Commissioner of the General Land Office; and mark the same "Defendants' Exhibit No. 43."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 43 (except in so far as it may contain admissions against interest on the part of defendants and in favor of plaintiffs), on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a copy of a copy, and no foundation has been laid for the introduction of such a paper; for the further reason that it is not evidence of the facts therein stated; and for the further reason that it is dated April 16, 1902, whereas title vested in the heirs of Baca April 9, 1864, and the jurisdiction of the Land Department over said lands then ceased.

403 "B"
M. E. L.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 23, 1910.

I hereby certify that the annexed copy of letter dated April 16, 1902, is a true and literal exemplification of the original in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

H. W. SANFORD,
Recorder of the General Land Office.

404 Q.

A. B. P. A. B. P. S. V. P.

DEPARTMENT OF THE INTERIOR,
2266-1899. WASHINGTON, *April* 16, 1902.

W. V. D. Baca Float No. 3.

The Commissioner of the General Land Office.

SIR: The Department is in receipt of your communication of December 9, 1901, and accompanying papers, relating to private

land grant known as Baca Float No. 3, situate in the Territory of Arizona.

By departmental decisions of July 25, 1899 (29 L. D., 44), and June 30, 1900 (30 L. D., 97), a survey of said grant was directed to be made by the surveyor-general of Arizona, in accordance with the principles announced in said decisions, upon proper deposit of the cost of the survey by the claimants under the grant. Motions for rehearing and review of said decisions were respectively denied by the Department, March 5, 1901 (30 L. D., 597), and June 1, 1901 (unreported). Prior to the decision of July 25, 1899, the grant claimants offered to deposit, to the credit of the government, at such time and place as your office should designate, the amount of money necessary to pay the cost of the survey, and asked to be noti-
405 fied of the amount required.

It appears that notice of said departmental decisions has been regularly given to the parties interested, but nothing has been done by the claimants under the grant with the view to its survey as directed. You ask to be instructed as to what further action should be taken in the matter by your office.

It is important that this grant should be surveyed its boundaries definitely fixed, and the granted lands ascertained and determined. The owners of the grant are entitled to all lands within the limits of the selection of June 17, 1863, which were at that date vacant, free from reservation, and not known to be mineral. The law makes it the duty of the surveyor-general to survey the grant and to investigate and determine, in the first instance, what lands were of the class and character contemplated thereby, at the date mentioned. (See departmental decisions of July 25, 1899, and June 30, 1900, supra.) To enable the land department to proceed to adjudicate claims to certain of the lands within the exterior limits of the selection, which are alleged to have been occupied, reserved, or known to be valuable for minerals at the date thereof, and therefore not subject to the grant, and at the same time to protect the interests of the grant claimants, it is essential that the survey be made and such investigation and determination be had. A due regard for the public interests requires that this should be done with all convenient speed.

You are accordingly directed to furnish the claimants
406 under the grant with an estimate of the cost of the survey, and to call upon them to deposit to the credit of the surveyor-general of Arizona, in some safe place of deposit to be designated by you, the amount of money necessary to meet the same, within sixty days from notice, or to show cause, if any they can, against this requirement. If deposit shall be made as required, you will cause the work of the survey of the grant to be immediately proceeded with under the directions heretofore given. If not made, you will report to the Department the proceedings had, together with any showing that may be filed, when the matter will be further considered.

Very respectfully,

E. A. HITCHCOCK, *Secretary.*

407 DEFENDANTS' EXHIBIT No. 45.

Counsel for defendants offer in evidence duly certified copy of a letter dated October 31, 1902, on file in the General Land Office signed by the Secretary of the Interior and addressed to the Commissioner of the General Land Office; and mark the same "Defendants' Exhibit No. 45."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 45 (except in so far as it may contain admissions against interest on the part of defendants and in favor of plaintiffs), on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a copy of a copy, and no foundation has been laid for the introduction of such a paper; for the further reason that it purports to be a copy of a decision of the Secretary of the Interior, which is reported in Land Decisions and is not admissible as evidence; for the further reason that it is not evidence of the facts therein stated; and for the further reason that it is dated October 31, 1902, whereas title vested in the heirs of Baca April 9, 1864, and the jurisdiction of the Land Department over said lands then ceased.

408 "B." DEPARTMENT OF THE INTERIOR.
M. E. L. GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 23, 1910.

I hereby certify that the annexed copy of letter dated October 31, 1902, is a true and literal exemplification of the original in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

409 P.

A. B. P. A. B. P. S. V. P.

2266–1899. DEPARTMENT OF THE INTERIOR,
WASHINGTON, *October* 31, 1902.

W. V. D. Baca Float No. 3.

The Commissioner of the General Land Office.

SIR: April 16, 1902, in reply to your communication of December 9, 1901, relating to the private land grant known as the Baca Float No. 3, situate in the Territory of Arizona, the Department stated and instructed your office as follows:

By departmental decisions of July 25, 1899 (29 L. D., 44), and June 30, 1900 (30 L. D., 97), a survey of said grant

was directed to be made by the surveyor-general of Arizona, in accordance with the principles announced in said decisions, upon proper deposit of the cost of the survey by the claimants under the grant. Motions for rehearing and review of said decisions were respectively denied by the Department, March 5, 1901 (30 L. D., 497) and June 1, 1901 (unreported). Prior to the decision of July 25, 1899, the grant claimants offered to deposit, to the credit of the government, at such time and place as your office should designate, the amount of money necessary to pay the cost of the survey, and asked to be notified of the amount required.

It appears that notice of said departmental decisions has been regularly given to the parties interested, but nothing has been done by the claimants under the grant with the view to its survey
410 as directed. You ask to be instructed as to what further action should be taken in the matter by your office.

It is important that this grant should be surveyed, its boundaries definitely fixed, and the granted lands ascertained and determined. The owners of the grant are entitled to all lands within the limits of the selection of June 17, 1863, which were at that date vacant, free from reservation, and not known to be mineral. The law makes it the duty of the surveyor-general to survey the grant and to investigate and determine, in the first instance, what lands were of the class and character contemplated thereby at the date mentioned. (See departmental decisions of July 25, 1899, and June 30, 1900, supra.) To enable the land department to proceed to adjudicate claims to certain of the lands within the exterior limits of the selection, which are alleged to have been occupied, reserved, or known to be valuable for minerals at the date thereof, and therefore not subject to the grant, and at the same time to protect the interests of the grant claimants, it is essential that the survey be made and such investigation and determination be had. A due regard for the public interests requires that this should be done with all convenient speed.

You are accordingly directed to furnish the claimants under the grant with an estimate of the cost of the survey, and to call upon them to deposit to the credit of the surveyor-general of Arizona, in some safe place of deposit to be designated by you, the amount of money necessary to meet the same, within sixty days from notice, or to show cause, if any they can, against this requirement. If deposit shall be made as required, you will cause the work of the survey of the grant to be immediately proceeded with under the directions heretofore given. If not made, you will report to the Department the proceedings had, together with any showing that may be filed, when the matter will be further considered.

The Department is now in receipt of your communication of August 20, 1902, and accompanying papers, from which it appears that an estimate of the cost of the survey of the grant has been furnished to the several claimants thereunder, and that said claimants have been called upon to deposit to the credit of the surveyor-general of Arizona an amount of money sufficient to meet such estimated cost, in the manner required by said instructions of April 16,
411 1902, or to show cause against such requirement. No deposit has been made.

It further appears that on July 21, 1902, James W. Vroom, on behalf of himself and John Watts, who claim to be the owners of said grant, addressed to the surveyor-general of Arizona a communication protesting against being required to deposit any more money than shall be necessary to pay for the survey of the exterior lines of the grant as shown by the selection or location of June 17, 1863. It is sufficient to say as to this protest that all the matters therein presented were considered and determined by the Department in its decision of March 5, 1901 (30 L. D., 497), before the rendition of which Mr. Vroom and Mr. Watts were fully heard upon all said matters. No error in that decision is pointed out by the protestants, and none is found by the Department. The protest is therefore dismissed.

You are directed to notify the claimants under the grant of the action upon said protest; also, that they will be allowed 90 days from the receipt of such notice within which to make the deposit required by the instructions of April 16, 1902, for the survey of the grant, and that in the event such deposit shall not be made as required the land department will proceed to adjudicate and determine all claims that may be presented to it for lands situated within the exterior limits of the selection or location of June 17, 1863, and alleged to have been occupied, reserved, or known to be valuable for minerals at the date of such selection or location.

Should the required deposit be made you will cause the
412 work of the survey of the grant to be immediately commenced, and proceeded with as speedily as practicable, under the directions heretofore given. If not made, you will cause notice to be given by the local officers of the land district wherein the grant is situated, for the period of sixty days, in two weekly newspapers published and of general circulation in the vicinity of the lands, that all persons now asserting, or who may hereafter assert, claims to any of said lands under the public land laws, will be allowed to present their claims to the register and receiver of the local land office, to the end that the same may be acted upon and adjudicated in like manner with other claims presented to such officers under the laws applicable to the public lands generally. In all such cases the claimants will be required to show, by satisfactory evidence, that the lands claimed were occupied, reserved, or known to be valuable for minerals, at the date of the selection of location of June 17, 1863, before their claims can be received. When, in any case, such showing shall not be made, the claim will be rejected. The right of appeal will be allowed as in other cases.

The papers are herewith returned.

Very respectfully, E. A. HITCHCOCK, *Secretary.*

413 DEFENDANTS' EXHIBIT NO. 47.

Counsel for defendants offer in evidence duly certified copy of the record press copy on file in the General Land Office of a letter from the Commissioner of the General Land Office, addressed to the Secre-

tary of the Interior, dated November 10, 1904; and mark the same "Defendants' Exhibit No. 47."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 47 (except in so far as it may contain admissions against interest on the part of defendants and in favor of plaintiffs), on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a copy of a copy, and no foundation has been laid for the introduction of such a paper; for the further reason that it is not evidence of the facts therein stated; for the further reason that it requires the claimants to pay the costs of survey; and for the further reason that it is dated November 10, 1904, whereas title vested in the heirs of Baca April 9, 1864, and the jurisdiction of the Land Department over said lands then ceased.

414 "B." DEPARTMENT OF THE INTERIOR,
M. E. L. GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 22, 1910.

I hereby certify that the annexed copy of letter dated November 10, 1904, is a true and literal exemplification of the press copy of said letter in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

415 W. T. P. E. W. H.

G. DEPARTMENT OF THE INTERIOR,
S. W. W. GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 10, 1904.

Address only the Commissioner of the General Land Office.

The Honorable, the Secretary of the Interior.

SIR: By departmental decisions of July 25, 1899 (29 L. D. 44) and June 30, 1900 (30 L. D., 97) a survey of the private land grant known as Baca Float No. 3, situated in the Territory of Arizona, was directed to be made by the Surveyor General of said Territory, in accordance with the principles announced in said decision, upon proper deposit of the cost of the survey by the parties who claimed to own the grant. It seems that prior to the decision of July 25, 1899, the grant claimants had offered to deposit to the credit of the government at such time and place as this office should designate the amount necessary to pay the cost of the survey and had asked to be notified as to the amount required.

Due notice of the amount to be deposited and as to the manner of making the same having been given by this office and no action having been taken by the claimants under the grant, this office sub-

mitted the matter to the Department and asked for further
416 instructions relative to the future action to be taken in the case, and by departmental decision of October 31, 1902, this office was directed to notify the claimants under the grant that they would be allowed 90 days from the receipt of such notice within which to make the deposit required for the survey, and that in the event such deposit should not be made the land department would proceed to adjudicate and determine all claims that might be presented to it for lands situated within the exterior limits of the selection or location of June 17, 1863, which were alleged to have been occupied, reserved or known to be valuable for minerals at the date of such selection or location; that should the required deposit be made this office should cause the survey to be immediately commenced and proceeded with as speedily as practicable, and if the deposit were not made this office should cause notice to be given by the local officers of the land district wherein the grant is situated for the period of 60 days, in two weekly newspapers published and of general circulation in the vicinity of the land, to the effect that all persons then asserting or who might thereafter assert claims to any of said lands under the public land laws would be allowed to present their claims to the Register and Receiver of the local land office, to the end that the same might be acted upon and adjudicated in like manner with other claims presented under the laws applicable to the public lands generally.

Notice of this decision having been served upon the grant claim-
ants and no action having been taken by them, the Depart-
417 ment on July 18, 1903, directed that the notice that applications for lands within the limits of the grant, and which were known to be reserved at the time of the selection made by the Baca heirs in 1863, would be received, should be published in accordance with the instructions previously issued in the case.

I have the honor to report now that the notice mentioned above has been published as directed by the Department and cases are pending in this office where it is claimed that lands covered by the homestead applications presented were known to be reserved to satisfy certain private land grants at the time of the location made by the Baca heirs in 1863. In this connection I would respectfully invite attention to the fact that inasmuch as the location of Baca Float No. 3 is not definitely known in this office, there being here only an office diagram prepared showing the approximate or supposed location of the float, it is impracticable for the office to determine in some cases whether or not the land applied for under the general land laws is within or without the location made in 1863 to satisfy this float.

For the purpose of administering the public land laws and in order that applicants under said laws may be forced to no unnecessary trouble, expense or delay in perfecting titles to which they believe they have a right under the general land laws, the exterior boundaries of Baca Float No. 3 should in my opinion, be surveyed
and connections of the same made with the other grants in
418 conflict therewith, whether the latter be confirmed or finally rejected.

While the office diagram mentioned above clearly shows what sections and portions thereof of the public lands which when surveyed will be covered by the said float, it must be remembered that this diagram cannot be relied upon except to show merely the approximate or supposed location of the float, and it is certain that the lines of survey when actually run in the field will not coincide exactly with the lines as laid down on the aforesaid diagram.

In view of the foregoing, and for the purpose of enabling this office to properly administer the laws relating to the disposition of the public lands, I would respectfully request that authority be granted for the survey of the exterior boundaries of Baca Float No. 3 and the connection of said exterior boundary lines with such private land grants as conflict therewith.

Very respectfully,

W. A. RICHARDS,
Commissioner.

A. D. H.

419 DEFENDANTS' EXHIBIT No. 48.

Counsel for defendants offer in evidence duly certified copy of a letter on file in the General Land Office dated December 28, 1904, from the Secretary of the Interior to the Commissioner of the General Land Office; and mark the same "Defendants' Exhibit No. 28."

Counsel for plaintiffs object to the admission of defendants' proposed Exhibit No. 48, on the ground that it is incompetent, irrelevant and immaterial, for the reason that it requires the payment of the costs of survey by claimants; and for the further reason that it is dated December 28, 1904, whereas title vested in the heirs of Baca April 9, 1864, and the jurisdiction of the Land Department over said lands then ceased.

420 "B." DEPARTMENT OF THE INTERIOR.
M. E. L. GENERAL LAND OFFICE.
WASHINGTON, D. C., *November* 23, 1910.

I hereby certify that the annexed copy of letter dated December 28, 1904, is a true and literal exemplification of the original in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

421 G.

E. F. B. E. F. B. S. V. P.

F. L. C. DEPARTMENT OF THE INTERIOR.
2266-1899. WASHINGTON, *December* 28, 1904

The Commissioner of the General Land Office.

SIR: The Department is in receipt of your letter of November 10, 1904, requesting that authority be granted for the survey of the

exterior boundaries of Baca Float No. 3, and the connection of said exterior boundary lines with private land grants in conflict therewith. As the public lands supposed to be within the exterior limits of said grant cannot be disposed of without such survey and as there appears to be no reason why the claimants for such lands should be delayed in perfecting their titles, the authority is granted in order that the public land surveys may be closed upon it.

When the grant claimants apply for patent to such of the lands within said boundaries as may appear upon investigation to be of the character of lands subject to selection under the act of June 21, 1860 (12 Stat., 71) the cost of such survey must be demanded of them as a condition precedent to the issuance of the patent. See Act of March 3, 1885 (23 Stat., 478, 499); Peublo of Monterey (13 L. D., 294). The execution of the survey will be in accordance with the directions heretofore given. (29 L. D., 44, 53-54; 30 L. D., 97, 105.)

Very respectfully,

E. A. HITCHCOCK, *Secretary.*

422 DEFENDANTS' EXHIBIT No. 49.

Counsel for defendants offer in evidence duly certified copy from the press copy of the original on file in the General Land Office of a letter dated January 12, 1905, signed by the Commissioner of the General Land Office addressed to the Surveyor-General of Arizona; and mark the same "Defendants' Exhibit No. 49."

Counsel for plaintiffs object to the admission of defendants' proposed Exhibit No. 49 (except in so far as it may contain admissions against interest on the part of defendants and in favor of plaintiffs), on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a copy of a copy, and no foundation has been laid for the admission of such a paper; for the further reason that it recites the transmission therewith of certain letters, and said letters or copies thereof are not included; for the further reason that it is not evidence of the facts therein stated; for the further reason that it contains reference to and gives instructions based upon decisions which are inapplicable to the selection of June 17, 1863; and for the further reason that it is dated January 12, 1905, whereas title vested in the heirs of Baca April 9, 1864, and the jurisdiction of the Land Department over said lands then ceased.

423 "B." DEPARTMENT OF THE INTERIOR.
M. E. L. GENERAL LAND OFFICE.
WASHINGTON, D. C., *November* 22, 1910.

I hereby certify that the annexed copy of office letter dated January 12, 1905, is a true and literal exemplification of the press copy of said letter in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

424 223,554—1904.

H. J. G. T. W. A. W. H. C.

G.
S. W. W.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 12, 1905.

Address only the Commissioner of the General Land Office.

The U. S. Surveyor General, Phœnix, Arizona.

SIR: I transmit herewith for your information and guidance a copy of office letter "G" of November 10, 1904, addressed to the Secretary of the Interior, requesting authority for the survey of the exterior boundaries of Baca Float No. 3, and the connection therewith with the private land claims in conflict and the adjoining public lands; and I also transmit a copy of instructions of December 28, 1904, from the Secretary, authorizing the said survey.

By referring to the decisions cited you will observe that the duty of investigating and determining, in the first instance at least, the character of the lands involved rests upon you, and that such investigation should be conducted and determination made as the work of survey progresses in the field. The duty of determining what portion of the lands covered by the Baca location was occupied or claimed under private grants at the time of the location of the float in 1863, also devolves upon you, and such lands as you find
425 were known to be mineral or were occupied or claimed, as above indicated, on June 17, 1863, are to be excepted from the survey of the Baca claim.

You will also observe that before the survey is made, notice of the proposed action must be published for a period of sixty days in two weekly newspapers published and of general circulation in the vicinity of the land, and in one newspaper of general circulation throughout Arizona, published at the Capital of the Territory.

In addition to the published notice, you should notify by registered mail all parties shown by the records of your office to be interested, those claiming under the Baca grant as well as those claiming adversely thereto.

You are therefore directed to let a contract for the survey of the grant in accordance with the instructions contained herein, as amplified by the directions of the Secretary of the Interior contained in the reported decisions above cited, and transmit the same to this office for approval.

Very respectfully,

W. A. RICHARDS,
Commissioner.

A. D. H.

426 DEFENDANTS' EXHIBIT No. 50.

Counsel for defendants offer in evidence a tracing of the plan of the survey of the location of Baca Float No. 3, Arizona, approved by the Surveyor-General of Arizona November 23, 1906, and a certified copy of the report of said Surveyor-General to the Commissioner of the General Land Office dated November 5, 1906, on the validity of such location, the said tracing and copy being duly exemplified from the originals thereof on file in the General Land Office; and mark the same "Defendants' Exhibit No. 50."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 50 (except in so far as it may contain admissions against interest on the part of defendants and in favor of plaintiffs), on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is not evidence of the facts therein stated; for the further reason that the purported copies of affidavits therein contained are not the proper method of proof of the facts stated in said affidavits; for the further reason that the Surveyor-General was not authorized by law to make the investigations therein referred to or to form or express any opinion based thereon in reference to the character or condition of the land; for the further reason that the plat attached to said Surveyor-General's report, and a tracing of which is included in said exhibit, is incompetent, irrelevant and immaterial, except in so far as it shows the exterior bound-
427 aries of the selection of June 17, 1863, and their connection with the lines of the public surveys; and for the further reason that said report is dated Nov. 5th, 1906, whereas title vested in the heirs of Baca April 9, 1864, and the jurisdiction of the Land Department over said lands then ceased.

428 K. DEPARTMENT OF THE INTERIOR.
A. D. H. GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 12, 1909.

I hereby certify that the annexed tracing of the plat of survey of the location of Baca Float No. 3, Arizona, approved by the Surveyor General of Arizona, November 23, 1906, and the annexed copy of the report of the Surveyor General of Arizona to the Commissioner of the General Land Office, dated November 5, 1906, on the validity of said location, are true and literal exemplifications of the originals thereof on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

429 OFFICE OF U. S. SURVEYOR GENERAL,
PHŒNIX, ARIZONA, *Nov. 5th*, 1906.

Referring again to your letter "E", dated July 21st, 1905, detail-
ing me as examiner of surveys to investigate and determine the

character of the lands to be embraced within the boundaries of the Baca Float No. 3, as required by the Act of Congress of June 21st, 1860 (12 Stats., 71), and in conformity with departmental decision of March 3, 1901 (30 L. D., 497-504,) I have to report as follows,—

On June 17, 1905, I entered into a contract on behalf of the United States, designated as No. 136, with Philip Contzen, Deputy Surveyor, providing for the survey of the exterior boundaries and accessory lines of the Baca Float No. 3, having previously given notice of the proposed survey and investigation for a period of sixty days in one newspaper of general circulation in the vicinity of the land, and in one newspaper of general circulation throughout Arizona, and advised by registered mail all parties shown by the records of this office to be interested.

On Oct. 24th I was informed by Deputy Contzen that he had reached Tubac and his survey of the exterior boundaries of the Grant was progressing to such an extent that I could determine upon the ground, during the progress of the survey, the lands to be embraced within said Float, as per the agreement of Contract No. 136 and special instructions issued thereunder.

430 On the evening of Oct. 31st, 1905, I left Phœnix for Nogales, Arizona, the county seat of Santa Cruz county, where it was my intention to examine the records of mines of said county before proceeding to the lands to be surveyed, and take the testimony of several parties resident thereof, whom I knew were old settlers in southern Arizona, and conversant with the character of the lands (prior to June, 1863) of the southern slope of the Santa Rita range of mountains in the vicinity of Salero and Salero Hill, Deputy Contzen having previously informed me that, from reconnoissance surveys, the North boundary of the Float would be located about 1¾ miles North of the summit of Salero Hill, and about 1 mile North of the Hacienda de Salero.

On my arrival at Nogales, (located on the border between the United States and Mexico) I located Mr. Thomas Gardner, who is eighty-two years old and almost blind. Mr. Gardner is held in high esteem by those who are fortunate enough to know him, as a man of honesty and integrity beyond question. By his affidavit you will observe that he has lived in the vicinity of Patagonia (which settlement is about six miles East of the East boundary of the Baca Float No. 3), for nearly fifty years, and testifies that he is intimately acquainted with the country contiguous and adjacent to Patagonia for from forty to fifty miles. At Nogales I also took the testimony of J. C. Dobbins, John Morrison, Allen T. Bird, whose affidavits are herewith transmitted as Exhibits Nos. 4, 3, and 7, in the order of their respective names; and before leaving Nogales made a

431 thorough search of the Records of Mines of Santa Cruz County, for dates of location and description and locus of claims, in the vicinity of Salero, Salero Hill, San Cayatana Mts., and Tubac (the latter place by the present survey being situated almost entirely within the limits of this Grant).

On November 10th, after having been in Nogales nine days, taking depositions and examining public records, I drove to Calabasas,

nine miles distant, and en route made inquiry of all the old inhabitants, with the hope of finding some of them who were conversant with the character of the country prior to June, 1863, but without success. At Calabasas I found and examined the ancient remains and ruins of the Hacienda Gondara, and the site of an old Military Post, once known as Fort Mason. The ruins of the Hacienda indicate that the buildings were constructed of adobe (sun-dried bricks) and were built around a square. Two of the buildings are still standing, and are occupied by a Mexican and his family. The remains of Fort Mason consist of stone foundations of buildings extending in a row along the bluffs facing a creek, and distant therefrom about one-fourth of a mile. Further mention and reference will be made to these ruins later on in this report.

On my return to Calabasas I took the testimony of Mr. George Atkinson, a farmer and stock-raiser in this community, whose affidavit is transmitted. On November 13th, 1905, I left Calabasas and drove to Tubac, taking the road down the Santa Cruz Valley, on the left bank of the Santa Cruz River, which said river traverses
432 the entire length of the Float. This road traverses the western slope of the San Cayatano Mountains, which are situated in the approximate center of the Float. I carefully examined the country en route, especially any old prospect shafts, tunnels and ground workings. On reaching Tubac I made a thorough and careful examination of the village, particularly an old fort (uninhabited) or "Presidio" and other buildings, particularly as to the probable time of their erection, based upon their present condition. I returned to Calabasas by the road leading up the right side of the river and the valley, stopping at the old Fort Tumacacori Mission, for the purpose of inspecting the ruins, and especially the remains of some old furnaces, slag piles, etc., referred to in the several affidavits and extracts herewith. In the rear of the ruins of these former buildings on the opposite side of the road, I found, badly scattered over the ground, large quantities of slag and a large mound, which was evidently the remains of a furnace for smelting ore; much slag, melted and burnt stone were visible. Mesquite trees about twelve inches in diameter were found growing amongst the slag quite abundantly, and their growth would indicate that they were thirty-five or forty years old. See photographs.

From this point I proceeded down the valley to the ranch and residence of Joseph King (an old settler) whose testimony was taken and is submitted herewith as Exhibit No. 8, thence back to Calabasas.

On the next day, November 15th, I proceeded to Salero, examining the entire character of the country to the East of the San
433 Cayetano Mountains, and embraced within the boundaries of the Baca Float No. 3, several old arastras (crude mineral rock crushers) and the remains of an old smelting furnace, in the vicinity of the latter. Much slag was in evidence. Arriving at the old Hacienda I made a careful examination of the old buildings, particularly as to their state of preservation, and the probable date of their erection. The old graveyard in this vicinity was examined, particularly the graves of Grosvenor and Stack, they being the only

ones with marked monuments and bearing date 1861 and 1860 respectively.

Leaving the Hacienda on horseback I made a thorough examination of the country contiguous thereto, and surrounding the Salero Hill, which contains numerous old workings, examined many witnesses and old mine workings, several of which indicate that they were excavated fifty to seventy-five years ago. The remains of many arastras are evident in this vicinity, some of which are in a fair state of preservation. Others are barely distinguishable. Photographs thereof enclosed.

I also found the ruins of many patios (enclosures for storing ore), some of which are in a fair state of preservation.

The country surrounding Salero Hill is conspicuously mineralized, and a person not conversant with the surface character of a mineral belt cannot fail to observe the existence of precious minerals, for its presence is apparent everywhere. Many mineral
434 ledges traverse the country and bold mineral outcrops are apparent even to a layman.

After a careful examination of the entire country embraced within the present survey by Mr. Contzen, excepting the lands embraced within the Tumacacori, Calabasas and Sonoita claims, I am of the opinion that the lands are mineral in character, and were undoubtedly known to be mineral at the time of the location of the Float,—June 17th, 1863.

The surface indications surrounding Salero Hill, old arastras, haciendas and patios, show beyond doubt that this portion of the Float was occupied by mineral prospectors before and at the time the Float was located; the old workings, which are abundant, and in which crude tools have been found, conclusively show that the country was worked profitably for its mineral at that time and years before, and if the party or parties who located its boundaries, as per their denouncement of the lands they desire to select under the Act of Congress of June 21st, 1860, supra, made such denouncement after carefully, or even casually, examining the country, they knew a greater portion, if not all of the same, was occupied and was mineral in character, excepting the lands immediately adjacent to the Santa Cruz River, which were in a state of reservation by virtue of the location of the unconfirmed Tumacacori and Calabasas Grants, and I am satisfied in my own mind that the passing of title to the Grant's heirs of any of the lands included in this survey, and particularly those lands in the N. E. corner thereof, surrounding Salero Hill, which I instructed Deputy Contzen to segregate by instructions dated June 17th, 1905, would be a great injustice, not
435 only to those who are developing this country and extracting valuable mineral therefrom at the present time as grantors or heirs of former occupants, but an injustice to those who have passed within the Great Beyond, who sacrificed their lives at the hands of the blood-thirsty Apaches in the development thereof, long before the Baca heirs dared attempt the perpetration of this fraud on these hardy pioneers and blazers of the western trail. Perhaps, like coyotes in the night, they sneaked into this country after an

Apache raid, or before a prospective one, and found the inhabitants had fled temporarily, and they then proclaimed the country vacant, unoccupied and non-mineral.

Passing to the testimony taken by me, and submitted herewith, it is fortunate indeed for the Government that several of the deponents, whose testimony is so valuable, are still living, and recall, as far back as the year 1858, the character of the major portion of the country embraced within the present surveyed boundaries of this Float. They are herewith submitted as follows,—

AFFIDAVIT OF THOMAS GARDNER.—EXHIBIT No. 9.

"My name is Thomas Gardner, age 82. I reside at Patagonia, in Santa Cruz County, Arizona. I have lived in the vicinity of Patagonia nearly fifty years, and am well acquainted with the country for from forty to fifty miles in that vicinity. I first visited the Salero in 1857 with a Mexican guide. I found three tunnels and ore shaft. There were also some old slag piles, arastras and some ore at the grass roots. There was too much water in the tunnels for me to examine them. I was induced to visit the vicinity because of reports that had reached me at Tubac of the richness of the Salero mine. I had heard of these mines before leaving California. The coun-
436 try, including the Santa Rita, range, was considered the richest in the southwest at that time. There were a great many mines opened up in the Santa Rita mountains in 1858. The district embracing the Salero mine was known in 1858 as the Wrightson Mining District. It was named for Mr. Wrightson, who was working the Salero mine at that time and I believe is now called the Tyndall district. Mr. Wrightson remained there until the Civil War broke out, when he left for the states, returned later and was killed by Indians. The Montezuma mine is situate about two or three miles South of the Salero Hill, and was being worked in 1858, and is still worked and known by the same name. There is a well defined mineral zone running through the Santa Rita Mountains, with numerous outcroppings with many prospect holes showing mineral, and this was well known in 1857-8.

Between 1857 and 1863 the valley of the Santa Cruz river above and below Calabasas was occupied by settlers who claimed title under Mexican and Spanish land grants."

AFFIDAVIT OF GEORGE ATKINSON.—EXHIBIT No. 12.

"My name is George W. Atkinson, age 60 years. I reside at Calabasas, in what was formerly Pima County, but now Santa Cruz County, Arizona. I have lived there with my family since January 1st, 1879. I am engaged in the business of farming and stock raising, and have been so occupied since my settlement at this place. I I came here in the first instance under a contract with the then owners or claimants of the Calabasas and Tumacacori Grants to manufacture brick and erect a hotel. I completed this contract by making the brick and erecting the hotel building, which is a two-story structure with porches, and cost about thirty thousand dollars, and

is still standing and has been, and is now, occupied by the representatives of the Great claimants. Since the decision of the Supreme Court of the United States holding said grants from the Mexican government to be illegal and void, the land upon which said hotel building stands was filed upon in June, 1900, in the land office at Tucson. In January, 1898, I filed upon the land upon which I have resided since coming to Calabasas. In order to make this land valuable for agricultural purposes I was compelled to reclaim it from its arid state, and to that end constructed ditches from Sonoita Creek, carrying the water from said creek to said land, and therewith irrigated the land.

In my business as a stock raiser I was compelled to, and did ride over the country constantly and thoroughly, now claimed to
437 be within the exterior lines of the Baca Float No. 3, as well as the adjacent country. I have thereby acquired an intimate knowledge of practically every foot of said country. I am acquainted with all the hills, valleys, gulches, mountains, water-places and the people who reside on these lands. I first heard of the Baca Float No. 3 in 1884. The information I then obtained concerning the claim was very slight and indefinite, and after careful inquiry found that no one living in the country knew anything about its location or where the boundaries were supposed to be. The first intimation that I had that the Float was located to cover the Santa Cruz valley was in July, 1899. Prior to that time the surrounding settlements ware discussing the location of the Grant. The people at and about Crittenden claiming that it lay West of that place, and on the western slope of the Santa Rita mountains, while the occupants of said western slope asserted that it lay to the east of themselves.

That portion of the country included within the present claimed lines of Baca Float No. 3, lying in the valley of the Santa Cruz, is covered with farming settlements, and the evidence is clear and abundant that these settlements have existed for more than fifty years. These settlements, composed of families, have now and have had for more than fifty years, houses, corrals, fences and irrigating ditches.

The Santa Cruz valley is bounded by mountains, and these mountains contain minerals of great value. This is self-evident to any one in passing over the country. The presence of deep shafts, large dumps, great piles of slag, and old arastras, show conclusively that mining operations in these mountains and within the claimed lines of the Baca Float No. 3, had been carried on very extensively, and undoubtedly with profit, as they show large expenditures of time and money. These mines were worked years before 1863, as is shown by these excavations. The working of mines in and about Salero Hill in 1861 and thereafter is a matter of common knowledge among residents of the country.

I am acquainted with the San Cayetano mountains, which lie near the center of the Float. This mountain is about 8 miles long North and South, and about 3 miles wide at its base. It is a fairly high mountain. The mountain is all mineral, and all about it, from its base to its summit, are evidence of large mining operations having

been carried on, which are disclosed by shafts and large dump piles. They are still working said mines, and have been for many years.

In January, 1880, I with others, met at the Lone Palm mine, which is situated south of Salero Hill, and within the lines of the Float. This mine was worked in ancient times, as no one,—not even Mexicans and Indians,—is able to state when it was discov-
438 ered or first worked. At this meeting we organized the Palmetto Mining District, which includes a large portion of the Southeast corner of the Baca Float, with boundaries as follows—The Sonoita river on the North, the Santa Cruz river on the west, the International Boundary Line on the South, and the Patagonia Mountains on the east.

I served one term as member of the Board of Supervisors of Pima County. I was well acquainted with Cas. D. Poston, Peter R. Brady and Peter Kitchen in their life time. All three are now dead. Joseph King is a neighbor of mine. All of the gentlemen named are men of unimpeachable integrity and veracity.

AFFIDAVIT OF JOSEPH KING—EXHIBIT NO. 8.

My name is Joseph King, aged 71 years. I now reside and have resided on my ranch about 800 yards east of the old Tumacacori Church or Mission since April, 1865.

I came to this section of the country from California in October, 1864. My first occupation was working on a road leading from the Santa Cruz river to the Salero mine or hacienda for and under the direction of Mr. Wrightson, who claimed to own the hacienda and the country about there. Later in the year I was employed by Mr. Wrightson, with many others, to make a survey of the country claimed by him. We commenced at a point about a mile and a half north of the Salero mine, and ran south several miles near to Sonoita, then ran east, then north, and then west to the foot of the mountain opposite the Canoa. A heavy snow-storm came on and we quit the work and returned to the hacienda at Salero on Jan. 1, 1865. The work was in charge of a Dr. Locke as surveyor, afterwards a man named Herrick. Among the other workmen I recall the name of John T. Smith, Fred Brown, Frank Morehouse, Jack Nealy, B. Morehouse, Jack Aggers, all of whom were discharged soldiers.

When I settled on my ranch in April, 1865, there were no people living in the valley of the Santa Cruz between Tubac and the mouth of the Sonoita. I understood at the time that the former inhabitants had quit the country because of the hostile Apaches. There were many houses standing in fields that were once cultivated, showing that the country had been occupied nearly as fully as it is at this time. There was a garrison at Tubac in 1864.

While I was employed at the Salero I saw the Salero mine and it had the appearance of having been worked many years before. It was not being worked at that time. There was another mine near the Salero called the Chenango. There was also a prospect
439 hole or cut far up on the side of the Salero mountain.

Mr. Wrightson was killed near Ft. Buchanan by Apaches in February, 1865. Near to the hacienda there were old slag piles

and old Mexican furnaces and arastras. I have seen at the Tumacacori mission old slag piles with mesquite trees growing up through them. There was an abundance of water at the hacienda, but as to other parts of this country I am not sure that there is running water, except in the wet or winter season.

I knew Mr. Chas. D. Poston in his lifetime. I also knew Sabino Otero. He was living near Tubac then and is still living there."

AFFIDAVIT OF WILLIAM McCOY—EXHIBIT No. 13.

"William W. McCoy, being first duly sworn, deposes and says, that he is now a resident of the city of San Bernardino, California, and has been for forty years last past; that he is now of the age of seventy-six years; that he went to Tubac, Arizona, in March of 1857, and remained there in said vicinity until March, 1860; that when deponent went to said Tubac, one Charles D. Poston was operating certain mining properties in the Santa Rita Mountains for himself and others; that said Poston sold a one-half interest in said mining properties to one Wrightson & Company in 1858, and after such sale, said Poston hired deponent to take ten (10) men and build houses, in order that they might be ready for occupation upon the arrival of said Wrightson; that during said year of 1858 said Wrightson came to Arizona and entered upon work in the mines aforesaid, and deponent was employed by said Wrightson as superintendent, and deponent continued in such capacity for a period of about eighteen months thereafter, working upon the "Salero," "Ohero" and other mines, which properties had been previously worked by Mexicans, as reported to deponent, and as he verily believes, during the time the country belonged to Mexico; that said Wrightson & Company also owned and worked the old "Mission Tumacacori," having bought it from a priest in Hermosillo, and got title to one league of land that had been given to a Jesuit priest by the King of Spain, as reported to deponent and as he verily believes; that said mines are located in said Santa Rita Mountains, about twelve miles in a westerly direction from the town of Patagonia, and about twenty-eight miles in a northerly direction from Nogales; that said mining district was known in 1858 among the mining people as the "Wrightson Mining District," having been named for Mr. Wrightson, who was working the "Salero" mine at the time, and I understand that said district is now known as the "Tyndall Mining District;" that the "Montezuma" mine is situated in the same district and
440 mineral zone, about two or three miles south of the "Salero" Hill and was being worked in 1858, and, the last I knew of it, it was still being worked, that there is a well defined mineral zone running through the Santa Rita Mountains with numerous outcroppings and many prospect holes were in existence, showing minerals, in 1857, and during the time that I was there, there were evidences of ancient workings for mineral in said mountains, which I personally saw; that the mineral zone and strike of the ledge through said mountains are such that a casual observer could not help but be struck by their strength and evidences of mineral deposits; that said country, during my stay there, was well known throughout the en-

tire part of that country at least, as being rich in mineral deposits of various kinds, such as lead, silver, gold and copper.

Deponent further says that during the time of his stay in and about said Santa Rita Mountains and Patagonia, the valley of the Santa Cruz River above and below Calabasas was occupied by settlers, who ranched and grazed the same and who claimed title thereto under Spanish and Mexican land grants."

Tubac, the village referred to by Mr. McCoy, is situated in the Northwest corner of the Float. The "Salero" and "Ohero" mines are both included in the segregated strip. The Wrightson Mining District is now known as the Tyndall Mining District and includes the entire Baca Float No. 3, which latter district was organized at Salero on the 17th day of November, 1876, described as follows:

"This district shall embrace the following territory, to-wit,—Commencing at the highest Santa Rita Peak, that is to say, the highest peak of the Santa Rita Mountains, in the County of Pima, Arizona Territory, and run thence West twelve (12) miles; thence South twenty (20) miles; thence East twelve (12) miles; thence North twenty (20) miles to the place of beginning; to-wit,—the highest peak of the said Santa Rita Mountains."

as certified to by Charles A. Shibell, County Recorder of Pima County, in his affidavit dated Nov. 13th, 1905, and attached hereto, as Exhibit No. 6.

441 COPY OF AFFIDAVIT OF CHARLES D. POSTON—EXHIBIT NO. 2.

(The original of which is now on file with the Interior Department.)

"Charles D. Poston, being first duly sworn on oath states,—That he is over seventy years of age. That he came to Arizona in the year 1854; that he came to this territory for the purpose of working a mine near the town of Tubac, on the Santa Cruz river, known as the Cerro Colorado; that he was sent to Arizona by a company of capitalists; that his first operations were in the Santa Rita mountains easterly from Tubac and northerly from Calabasas, but shortly after included the said Cerro Colorado mine, which was located west of the river; that his headquarters for many years was at Tubac and that he was well acquainted with the people who had settled in that vicinity and the topography of the country; that at that time what is known as the Salero Hills, which are a part of the Santa Rita range, and which include the westerly and northerly and southerly slopes of that range, was the only known mineral lands within the borders of what is now Arizona; that that region had been worked for generations by those who preceded the Spaniards and by the Spaniards and Mexicans; that the same were worked for lead and silver ores in the main; that the evidences of this working for ages was evidenced by shafts and drifts and tunnels and slag piles and the ruins of old arastras and adope smelters; that the method of working was primitive but that quite a large settlement of people and quite a number of laborers were constantly delving in these mountains and while the profit to the individual was not large, in the

aggregate the ores that were mined furnished a support to a community of about 150 people. He states that the whole Santa Rita range of mountains and the foot hills at their base whenever the native rocks outcropped and clear to the immediate bluff of the Santa Cruz River, was the territory in which the miners worked, and that outcropping of the ores was to be seen here and there over that territory. He states that he was acquainted with John S. Watts, who was a delegate to Congress from the Territory of New Mexico, which then included the Territory of Arizona; that the said Watts was well acquainted with the character of the lands included within Baca Float No. 3, and its mineral character. Affiant states that 12 miles square commencing at a point one mile and a half from the base of the Salero mountains north 45° East of the highest point of the same, thence west, south, east and north twelve miles would include a large portion of the said mineral lands. That said square would also include a large portion of the Santa Cruz valley, including and below Calabasas. Affiant states that he was acquainted with Manuel Gandara, who had been Governor of Sonora and a very distinguished citizen, soldier and statesman; that from the time of the Gadsden purchase and many years afterwards, said Gandara resided for quite a large portion of the time, off and on, near Calabasas, where he had a large hacienda composed of many buildings, corrals and lands in cultivation and a large retinue of soldiers and servants forming quite a village and settlement; that he had large herds of sheep and cattle and factories for the manufacture of wool into fabric, and he then claimed to be owner of a large tract of land which included the valley of the Santa Cruz and Sonoita from a point several miles above Calabasas, and from a point up the Sonoita at the western terminus of the Sonoita Grant, down the valleys of both streams to their junction near Calabasas and down the Santa Cruz valley to a point near Tubac. That the said Grant was claimed and known as Calabasas and Tumacacori land grant and was claimed to include all the arable lands in the valley and all the grazing lands contiguous thereto.

442

That the said Calabasas Grant, as the same was claimed by said Gandara and occupied and controlled by him, included more than the south and west half of the Baca Float No. 3; that the hacienda of Gandara was occupied as aforesaid in June, 1863, and continued to be for years after. Affiant states that by reason of said Calabasas land grant the lands included within the boundaries of the claim were not subject to entry under the Land laws of the United States, but were withdrawn from entry and continued so to be until within a year or so last past when the Supreme Court of the United States finally decided against the validity of said grant. Affiant states that knowing the country as he did at the time and the boundaries of the location of Baca Float No. 3, the same was evidently located to cover and include the only well known mineral lands in the southwest at that time, and the boundary could not have been selected as it was for any other purpose than to include the minerals for the reason that said lands had then no value for any other purpose.

That fact was apparent and well known to whoever was acquainted with the topography of the country and the character of that region. And further affiant saith not."

AFFIDAVIT OF SABINO OTERO—EXHIBIT No. 5.

"Sabino Otero, being first duly sworn, testified as follows,—I am a resident of Tubac, in Santa Cruz County, formerly a part of Pima County, Arizona. I was born in said Tubac in 1844. In 1854 I was living in Tubac, with the other members of my father's
443 family. Some years thereafter, probably in 1861 or 1862, Charles D. Poston came there and established his headquarters in the old fort or Presidio, the ruins of which are near the present school-house of Tubac. He began operating mines in the vicinity quite extensively and continued to do so for five or six years, as I now remember. He was succeeded as manager of said mines by a man named Leadruff, I believe.

I am well acquainted with Salero Hill and its neighborhood. I have been for many years engaged extensively in the cattle business. My headquarters ranch is at Tubac. I am familiar with every portion of the country included within the supposed boundaries of the Baca Float No. 3, having ridden over it in the business of looking after my cattle. Said Float includes a large portion of the Sonoita Grant, which has been decided to be a valid grant by the Courts, a part of the Calabasas and Tumacacori grants, or possibly the whole of them. Also a large portion of the mineral country that has been known as mineral by every one living in the country, from my earliest recollection,—such as the Salero and the adjacent country.

The Calabasas Grant was owned and occupied by Governor Gandara, a former governor of Sonora, who had large flocks of sheep thereon, and cultivated the lands in the valley of the Santa Cruz. A German named Hulseman was his manager or major domo.

The valley of the Santa Cruz has been occupied by farmers and raisers of stock since my earliest recollection. The country surrounding the Santa Cruz valley is mountainous, and these mountains contain mines of mineral.

I was well acquainted with Wrightson, who was working mines at Salero Camp. I often saw him at Col. Poston's office in the Presidio at Tubac. I am not certain of the date when Wrightson first went to Salero, but think it was 1862. He continued to operate said mines until he was killed by the Indians, the exact date of which I cannot fix.

From 1861 to 1863 the mines in that country were operated except when the miners were compelled to leave on account of the Apaches.

There is much evidence of mining having been carried on in the Santa Rita mountains and in other parts of the country contained within this Baca Float, many years before the country passed under American control.

My father and my uncle informed me that ores from the Salero and Huebabi and other near-by mines, were brought to Tumacacori and treated there. I have seen at the old mission piles of slag, with large mesquite trees growing out of said slag-piles, showing that the smelting occurred long ago,—certainly before I was born.
444 The Huebabi mine is located about 8 miles North of the old Huebabi Mission on a range of mountains between the

Potrero Creek and the said mission, and just South of old Fort Mason.

I have been acquainted with the settlers in the Santa Cruz Valley since boyhood, and I never heard mentioned by them of the Baca Float until about 1899. If the Baca Float No. 3 had been located on the ground in 1863 I, in common with my neighbors, would certainly have known it."

AFFIDAVIT OF GENS PETERSEN—EXHIBIT No. 14.

"My name is Gens Petersen, aged 64 years; I reside at Salero, Santa Cruz County. By occupation I am a miner and prospector. I have resided here most of the time since 1878. I have followed my present occupation since 1878 in northern part of Santa Cruz County, and have prospected over the region about Salero for a distance of 10 or 20 miles. It is a rich mineral section abounding in gold, silver, copper and lead. I have discovered and sold three good mines and several others that were not so good. The out-croppings of the veins are plainly visible, being very bold. Many of the veins have as many as eight or ten claims upon each.

The general appearance of the country at Salero Hill and its vicinity conveys a clear impression of its mineral character. So clearly evident is the presence of mineral that a person unfamiliar with mineral land would know that the country is not agricultural, but mineral land."

AFFIDAVIT OF JOHN MORRISON—EXHIBIT No. 3.

My name is John Morrison, aged 56 years, residence Harshaw, Santa Cruz County, Arizona, by occupation a miner and prospector. I have resided in the vicinity of Harshaw since 1881, and know the country, in respect to its mineral character, embraced in that portion of the Baca Grant in the neighborhood of the Salero Mine. I have followed the occupation of a miner in all of the states and territories known as the Rocky Mountain region and the Pacific Coast for about 37 years. By the term mining I mean both labor in mines and in prospecting for mines. In the pursuit of my business I have discovered mines of gold, silver, lead and copper, and have sold them. I consider myself, by reason of my long experience as a prospector, to be able to determine whether minerals are contained in the country or whether it is non-mineral land. In regard to character of the country for a radius of 10 miles from the Salero I know it to be a good mineral region with veins
445 and outcroppings plainly visible, even to a person who knows but little of mining. I have seen many indications of former workings of mines, and while I do not know the date when they were worked, it must have occurred 20 or more years before my arrival in the country. From my general knowledge of the country I regard the Santa Rita mountains as a rich mineral region, containing gold, silver, copper and lead, and particularly do I say this of the Tyndall District."

AFFIDAVIT OF ALLEN T. BIRD—EXHIBIT NO. 7.

"My name is Allen T. Bird, aged 56 years. Have resided in Nogales, Santa Cruz County, Arizona, during the eleven years last past. I am the editor of "The Oasis" newspaper published in Nogales, and by profession a mining engineer.

My knowledge of the region included in the Baca Float Grant No. 3 was acquired through personal observation made during many and frequent business and professional trips into the region, where I have had mining interests for a number of years,—being interested in the "Wandering Jew" and "Joplin" group of claims in the Tyndall District in said county, and the "Great Excelsior," a property away up in the Santa Rita mountains some ten miles North from the "Wandering Jew." Have also made examination and reported upon the "Apache Chief" group of mines, the Warsaw, Royal Blue, Bland, Josephine, Rhode Island, Connecticut, Temporal, Happy Jack and many other mines in the region.

All geological evidences go to show that the region is one of great and widely distributed mineral wealth. No geologist or practical miner could ever traverse the region in any direction without being impressed by the formation upon all sides, as being richly mineral.

Prior to 1863, and at that very time, Tubac was a thriving, bustling town, one of the most important in the Territory, supporting a newspaper. That town was built up on the mineral resources of the Santa Rita mountains. It was a thriving place from the time of the American occupation until long subsequent to 1863. It was the supply point and headquarters of many mining men then operating in that region. Among those known to have been engaged in mining in this region were Wrightson and Grosvenor, whose names were given,—Mt. Wrightson and Mt. Grosvenor,—the two loftiest peaks in the Santa Rita mountains. In a small graveyard near the road leading from Tubac to Salero, is the grave of Grosvenor, with a small headstone, the inscription on which recites that he was killed by Apaches April 25, 1863. Prior to that time

446 Mr. Grosvenor had been engaged in mining several years in the region included in the Baca Float Grant. The graveyard mentioned has about twenty graves, all of people who died or were killed by Apaches, and who were engaged in mining in that region at about the same time that Wrightson and Grosvenor were so engaged. The headstone of but one of them has a legible inscription, and that shows that the deceased was killed by Indians in 1861.

In our own properties we have found unmistakable evidences of former occupancy and operations. Upon the "Wandering Jew" mine we stripped the top of the ledge a distance of nearly 300 feet between two shafts we were sinking. Our first work on the trench we dug about four feet in depth was in virgin ground, and our excavation exposed the mineral in the ledge, which is a high grade galena, interspersed with gray copper. At the end of about 150 feet we broke into an old working that had been completed much the same as our own, and afterwards covered over. First small saplings and boughs of trees had been laid across the trench, which

was on a side hill just below the crest of a ridge. The network of boughs and saplings was covered with a thick layer of closely matted twigs, over these was laid a layer of grass, and upon that a layer of dirt. In a very short time after that covering was made, natural causes assimilated its appearance with the adjacent earth, so no one could detect the covered work. We stopped throwing off this old covering when we reached the dump of our own shaft, and made no effort to carry it beyond the dump. Had we sunk the shaft on the vein we should have penetrated the same old workings; but we had sunk between two veins and cross-cut both, our object being to cut each away below the old work uncovered in the trench. That work we believe to have been done by the Jesuit missionaries, the ruins of whose old church in the Santa Cruz valley, at Tumacacori, are visible from the "Wandering Jew" ridge. That mission was abandoned about 1769 at the time of the expulsion of the Jesuits from Mexico. The Tumacacori priests are said to have left records to show that they operated mines in the Santa Rita mountains and shipped the bullion.

Col. Poston, in his work on Arizona, quotes the Jesuit records wherein is given a description of the location of their property. It states that standing in the church and looking through the east door towards the mountains, about ten miles distant is seen a sharp picacho or pinnacle, and that near that are the mines worked by the priests. Standing in the old ruined church to-day and looking through the east door, there is discovered the pinnacle described in the record, and it is the highest point on the ridge through which runs the "Wandering Jew" ledge. The work we uncovered we believe to be a part of that done by the Jesuits. And some-
447 where in that hill are doubtless deeper and more extensive workings, co-temporary and covered in the same way.

Upon the Great Excelsior are found already completed a tunnel more than two hundred feet in length, by whom done and when no one has ever known. The old time workers, whoever they were, first leveled off a bench about thirty feet wide in the side hill from which they started their tunnel. The first fifty-five feet are through *soild* syenite, and then the ore body is penetrated and the tunnel cut into that about 480 feet, in ore all the way, with ore still in the face. About sixteen feet before the end is reached there is a drift eighteen feet wide to the right, and about one hundred feet nearer the tunnel entrance are two other drifts, one twenty-seven feet to the left, the other sixteen feet to the left. These three drifts are all in ore. The ore is a granular iron pyrites, that carries a little gold,—not exceeding two or three dollars per ton. In that tunnel we found an old wooden wheelbarrow. There was'n't a nail or a bit of iron in it. The wheel was a slice out of the trunk of a tree, and all of its joints were fastened with rawhide thongs. Upon the shelf outside a bulkhead had been built from tree trunks, and the ore taken out of the workings piled up against it,—more than 200 tons. The tunnel itself is small but as straight as an arrow, and the floor and arch are as smoothly cut and dressed as if the work had been done by a stonecutter for a building. When or by whom that work was done, even tradition is silent. In the old Tumacacori mine, sold by one of my

partners, Mark Lully, with the Apache Chief group, there is an old shaft, which tradition credits to the Jesuits. Many other claims in the vicinity have similar antigua workings."

AFFIDAVIT OF J. N. CURTIS—EXHIBIT No. 10.

"I am a manager of mines. My age is 56 years, and have been connected with mines as manager for 25 years. I am at present General Manager of the Alto Copper Company, and of the Mowry Mines Company, both companies are located in Santa Cruz County, Arizona. Previous to my present position I was General Manager of the Silver Bell Copper Company of Pima County, Arizona, and other well known mines in Arizona. I have made a special study of mineral veins and have traveled over the southern part of Arizona very extensively examining the different mining districts very thoroughly. I am considered an expert judge of mineral veins and deposits. I have located and developed several mines, and put them on a producing and paying basis. I have been able to get capital interested with me in my developing of such mines, without
448 any trouble; my name, as a mining expert and engineer, being of sufficient guarantee to capital to furnish the necessary funds for this work, and I have always succeeded in putting the property on a producing and paying basis.

I visited the Tyndall Mining District in 1899 and found it to be of large area, very plainly and strongly marked with large mineral veins, with very distinct croppings of ore, of great length and width. In coming into this mining district from Patagonia, the road passes through the Montezuma vein. This dike or vein is over fifty feet in width, its croppings are very bold and can be traced for a long distance, so plain and strong is the Montesuma vein that travelers, who are not miners, speak of it as a wonderful showing of a mineral vein. The Montesuma is a true fissure vein in the granite. Proceeding on from the Montesuma vein towards the Salero Hill, other mineral veins are encountered with bold outcroppings, namely the Darwin (Darum) and others, some of them showing very old workings which were undoubtedly done by the ancients. Proceeding further into the district towards and to the Alto Hill, formerly known as El Plomo, the mineral veins become more frequent, are parallel, and often only 200 to 300 feet apart with very plain outcroppings, which can be traced for over two miles in length, namely, the "Jefferson," with a width of ore on the surface of over 20 feet, the "Buena Vista" with a width of ore of over 40 feet, the "Alto" and many other parallel ledges, all so plainly marked as mineral veins on the surface that they can be easily traced for miles, making the mineral character so very plain and evident to any one going over this part of the Santa Rita mountains.

The surface ores are generally a lead-silver ore, and in depth passing into a copper-silver or gold ore. They are distinctly a smelting ore.

The geology of this section of the Santa Rita mountains, namely, the Alto Hill, the Jefferson Hill, and the Salero Hill, is as follows,—

the country rock of this entire section is essentially granite of two distinct types; the lower that of the dark variety, known as the Laurentian, while overlaying is a light colored and extremely decomposable type of more recent age. Inter-stratified between the light colored schists of the granite or Archean age, great sheets of molten lava have been intruded and by lifting up the overlying schists, as noticed on Alto Hill, particularly, have formed high dome-like masses of Lacolithic structures, which to-day we classify as that particular type of Plutonic lava known as Gabbro. Subsequent corrugation of the earth's crust, the result of construction, bowed up the granite and formed the sharp, pronounced anti-clines known as Alto Hill, Jefferson Hill, etc. Through the center or apex of
449 the hill, a series of parallel fractures or fissures were created by this movement, and the fractures or fissures are represented by the Alto vein, the Buena Vista vein and the other parallel veins of this hill, with an approximate strike in their longitudinal course of N. 60° E. to 80° E."

In conjunction with my findings herewith and the several preceding affidavits, I deem it of the utmost importance to refer briefly to the early authenticated history of the present portion of Arizona purchased from Mexico by the treaty of 1853, and known as the Gadsden Purchase. From which history it is evident that the mineral character of this country was well known as far back as the year 1840. To my mind the only reason why this great stored wealth was not extracted and worked on a larger scale prior to the year 1863 was due to the murderous Apache Indians, who raided this locality from time to time, murdering the prospectors and inhabitants, capturing their stock and burning any improvements they might have erected. The "Hand Book of Arizona, its Resources, History, Towns, Mines, Ruins and Scenery," by Richard J. Hinton, (entered in the office of the Librarian of Congress, Washington, D. C., in the year 1877,) deserves numerous quotations here; but for the sake of brevity this history will not be referred to at length. The writer in his narrative shows that he was thoroughly conversant with the entire region embraced in the Gadsden Purchase, and particularly conversant with the mineral regions thereof. His work contains a description of the valley of the Santa Cruz, in the vicinity of Tubac, and of the Santa Rita mountains and
450 their conspicuous peaks, namely, Mts. Wrightson and Grosvenor, named in honor of two bold pioneers and prospectors; the latter in 1861 was slain near the old Hacienda at Santa Rita, presumably by the same band of Apache Indians who murdered Mr. Wrightson, the manager of the Salero County, shortly before. (Messrs. Wrightson and Grosvenor are referred to in the several affidavits herewith.) He speaks of Prof. Pumpelly, whom I will refer to hereafter, then an engineer developing mines in the Santa Rita Mts., and adjacent thereto, the ruins and shafts of which are plainly seen throughout the Santa Rita Mts. The author refers to the Tumacacori Mission, but states that all that remains of its history is merely tales handed down from generation to generation; but in this he is mistaken, for the buildings are still intact, although in a

bad state of preservation. He speaks of the Salero mines and other mines of the Tyndall Mining District.

On page 195 the author quotes from an old Spanish work entitled "Apostolic Labors of the Society of Jesus," which is published by one of the most illustrious members of that order, as follows,—

"In the year 1769 a region of virgin silver in the Santa Rita range of mountains, Arizona, was discovered on the frontier of the Apaches, a tribe exceedingly valiant and warlike, at a place called Arizona, on a range of mountains which had been named by its discoverers 'Santa Rita.'"

He further speaks in his work of an expedition of over 200 men that was fitted up by the Domisio Robles in the year 1847,
451 which proceeded to the Santa Rita Mountains to discover the valuable minerals reported to be located therein, and says,—

"The members of the Robles expedition unanimously agreed that the entire region was wonderously rich in minerals, and that to the East of the scene of their explorations the range was filled with veins of gold and silver, crossing each other in all directions."

With reference to later expeditions the author speaks as follows,—

"A talented group of men, many of them widely known in public events of the past two decades, have been connected with the Santa Cruz Valley and the mineral explorations of the Santa Rita, Apasscoso, Cerro and Patagonis Sierras. From 1858 to 1861 the town of Tubac was headquarters for the Salero Mining Co., and also for the Cerro Colorado and other organizations. The first named was a Cincinnati Co., formed to work the Salero and other mines to the East of the Tumacacori Mission. Mr. Wrightson, formerly of the Cincinnati "Inquirer," was its organizer and early manager. H. C. Grosvenor, an English engineer, was also superintendent. Gilbert Hopkins, a well known mineralogist and engineer, Prof. Raphael Pumpelly, Geologist, engineer and author, now professor at Harvard, were the earliest American explorers and workers connected with this company. Col. C. D. Poston * * * and General Heintzelman * * * mining engineers of repute, were among the daring men who sought for treasure here. The records and reports left by these daring explorers are an evidence of the vast wealth barely attacked in the Santa Ritas, though different Aztec, Jesuit priests and Spanish explorers have worked in them for centuries past, the importance of this region can be seen when it is stated that seventy-five years ago the Spanish record shows that there were 150 silver mines in operation within a circuit of fifteen miles of the Presidio of Tubac."

With reference to the work, "Across America and Asia, Notes of a Five Years' Journey Around the World," spoken of by Mr. Hinton, and written by Prof. Raphael Pumpelly, published by Leypoldt and Holt of New York in 1870, the same contains an account
452 of the early mining in the Santa Rita Mountains. The author states that his trip through Arizona was commenced in the year 1860. He gives a description of his journey from Tucson (which is now one of the most prosperous small cities of the Southwest) southward up the Santa Cruz Valley to Tubac and the Santa

Rita mountains. He describes the Hacienda of Santa Rita and of the valley speaks as follows,—

This valley of the Santa Rita, it has been said, has twice during the past centuries been the scene of mining industry, and old openings on some of the veins, as well as renewed furnaces and arastras, exist as evidence of the fact; but the fierce Apaches have long since depopulated the country, and with the destruction of the vast Jesuit power all attempts at regular mining has ceased. The object of the Santa Rita Company was to re-open the old mines or sork new veins and extract the immense quantities of silver, with which they are credited by Mexican tradition. With reference to his work in and about these mines, in the vicinity of Salero, the author states,—

"At last the result of six weeks' smelting laid before us in a pile of planchas, containing silver, and there only remains the separating of these materials to be gone through with. During this process, which I was obliged to conduct myself, and which lasted some fifty or sixty hours, I scarcely closed my eyes, and the three other Americans, revolvers in hand, kept an unceasing guard over the Mexicans, whose manner showed plainly their thoughts. Before the si-ver was cold we loaded it, with the remaining property of the company, even to the wooden machine for working the blast, in the return wagon and were on the way to Tubac, which we reached the same day, the 15th of June. * * * Thus ended my experience of eight months of mining operations in an Apache stronghold."

453 Another history, to which I will make brief reference, is one published by J. Ross Brown, entitled "The Apache Country, a Tour through Arizona and Sonora." This book was published by Harper and Brothers of New York, in 1869; it contains on page 19 a photograph of the silver mines of the Santa Rita mountains, and with reference to them the author states,—

"In August, 1856, an exploring party outfitted at San Antonio, Texas, and after a perilous journey through the Apache Pass arrived at Tubac and proceeded, under the direction of Mr. Poston, to examine the silver miles reported to exist in the Santa Rita, Cerro Colorado and Aravaca mountains, and in 1857 companies were formed for their purchase and development."

The author speaks of the Santa Rita district, and includes in his work a picture of the Hacienda of Santa Rita, and states,—

"Early in the afternoon we reached the beautiful Hacienda of the Santa Rita company, now solitary and desolate. The houses have gone to ruin and only a few adobe walls, furnaces, and the frame work of the mill remain to mark the spot formerly so full of life and enterprise. It was sad to stand amongst these ruins and think how hard a fate had been the reward of nearly all of the enterprising men who had built up this little community. A few years ago these houses, now empty and crumbling down into dusty fragments, were replete with busy life. The reduction works were in full blast, and every heart throbbed with the brightest anticipation of the future."

Referring to the Salero Mountain, which he states is in a pleasant little valley, stands the ruins of the peon houses once occupied by the operatives of the Salero mine, which mine he states is the prin-

454 cipal one in this region, situated in the side of the conical mountain of the same name, rising immediately from this little valley and presenting some very striking mineral phenomena. The shaft is seen about a third of the way up its face, is approached by a wagon road which cuts and leaves exposed a number of veins running into the mountain in nearly the same direction, and all bearing more or less indications of silver. This mine has long been known to the Mexicans, and was worked more than a century ago under the directions of the Jesuits of Tumacacori.

Again on page 231 the author says that on the following day he visited at least fifteen or twenty distinct mines, all partially opened and well tested, forming what might be termed a perfect net-work of silver bearing leads. Among these were the Salero, Bustello, Crystal, Encarnacion, Cazador and Fuller, each one of which has yielded, under a very imperfect system of working, from four to fourteen hundred dollars to the ton. The author states that these assays and experiments were made by such men as Pumpelly, Blake and others. The Blake referred to is Professor William P. Blake, whose affidavit is herewith transmitted.

Mr. Brown published a book entitled "Report of J. Ross Brown on the Mineral Resources of the States and Territories West of the Rocky Mountains;" this book was published in 1868 by the Government printing office at Washington, D. C., and I understand that the investigations were made under instructions from Congress.

With reference to the Santa Rita mines he says, these mines are located in the Santa Rita Mountains, some ten miles East of
455 Tubac, and fifty miles South of Tucson. Mr. Wrightson, the agent of the company, owning most of them, thus refers to their characteristics in a report made in 1859. Then follows the report of Wrightson, which covers the time he was operating in this locality for the extraction of the precious metals supposed to be contained therein.

I quote the following extracts from "Arizona as it is, or The Coming Country," by Hiram C. Hodge, compiled from notes of his travels during the years 1874-5-6, published by Hind & Haughter of New York City, in 1877, page 128.—

"Another rich mineral range of mountains is the Santa Ritas, west of the Patagonia Range, and divided from them by the rich and beautiful Sonoita Valley. The Santa Ritas are twenty miles long north and south, with a width of three to six miles, and they seem to be filled with lodes of gold, silver and lead to its whole extent. The district embraced in the old Santa Rita Mining District is in the southern declivity of the mountains, twelve miles east from the old Tumacacori Mission church, and sixty-five miles south from Tucson. Some of the mines in this district give evidence of having been worked a century or more since, and from tradition now current much silver was mined here by the old Jesuit Fathers, who employed large numbers of Mexicans and Indians in the work. From 1856 to 1860 the mines here were worked by an eastern company; but owing to the continued and determined hostility of the Indians, who killed many of the employés, Superintendent Wrightson and others discontinued their work."

I also quote the following from Senate reports of "Explorations and Surveys, (36th Congress, 2nd Session), to Ascertain the Most Practicable and Economical Route for a Railroad from the Mississippi Ocean" Made under the Direction of the Secretary of War, in 1853-1856, according to Acts of Congress, Vol. IX" * * *

456 Translation of an Archive from Tueson, concerning water-places, lands for corn-fields, pastures for horses and cattle, and minerals, etc., in the locality of Tubac, submitted by Manuel Barragua, to and on the request of Senor Capitane Don Pedro Allande Y Savedra; he affirms that

"the Town of Tubac is situated between two mountains, which are distant from each other six leagues.

In the valley there is much lands fertile and suitable for corn fields. There is sufficient water for wheat growing, but scarcely enough each year for corn. * * *

There is much pasture, with an abundance of sustenance for horses and cattle, as well as on the hills and in the dales as on the mountainless plains. * * *

There are many mines of very rich metals to the west * * *

In the Santa Rita mountains and its environs, which is distant from Tubac about four leagues, there have been examined five silver mines. Two have been tried with fire and three with quicksilver, with tolerable yield. All of this is notorious among the entire population, and they do not work them because there are Apaches in all these places; because they live and have their pastures there, and pass continually by this mountain itself to a place a little more than four leagues off, called the Hot Springs (Agua Caliento). Daily experiencing more violence from the enemy, because he is aware of the few troops that we possess, we have desired to break up our homes and sell our effects; and you being aware of it, we received the order which you were pleased to send us, imposing heavy penalties upon us if we should remove; * * * and now finally, the last month, the Apaches finished with the entire herd of horses and cattle, which we had guarded; and at the same time with boldness destroyed the field and carried away as much corn as they were able. Since the Fort was removed to Tueson these town- and missions have experienced some casualties, so much so that they have been obliged to burn the town of Calabasas,—a calamity it had never before experienced. Also, but a few days ago, the cavalcade which the Apaches brought from the West was grazing for three days in the vicinity, falling every day upon the fields to load with corn, and to run away with those whom they found there; and lastly, their not leaving the neighborhood, we momentarily expect that they may

457 serve us and our families as they have served our property, there being nothing else left for them to d-." * * *

Lastly, I will conclude the several questions with one from a speech made by the Hon. John R. Watts, Delegate to Congress at that time from the Territory of New Mexico, made before the Second Session of the 37th Congress, 1861-62, contained in the "Congressional Globe." This same Watts is the gentleman who located the Baca Float No. 3.

"Mr. WATTS,—Mr. Speaker, it is the general impression that this distant Territory (Arizona) is a God-forsaken portion of the world, of no interest to anybody, and that nobody need take any interest in. Now, I wish to satisfy the House that this is a mistake; that although every acre of ground that is within the limits of Arizona will not produce seventy-five or eighty bushels of corn, it will produce seventy-five or eighty or one hundred dollars' worth of the precious metals, including gold; and I think the experience of the world is beginning to show that cotton is not king, or if it is, that gold is not only king, but king of kings; * * * I hold in my hand a specimen of the productions of the Territory of Arizona. I can send it to the Mint, at Philadelphia, and when examined and assayed, it will produce in the article of silver alone $5,000.00 to the ton. That is a choice specimen. I hold in my hand an assay from the Mint at Philadelphia, of an ordinary specimen from the same vein. I ask the Clerk to read it."

The clerk reads a letter enclosing a report from the Director of the Mint at Philadelphia, of date May 2, 1862, of the assay of some silver ore from the Heintzelman mine in Arizona left for assay, and amongst other things the report states that ore of the quality submitted would yield $1,560.00 to the ton. The Heintzelman Mine is the Cerro Colorado mine, of which in the preceding extracts you will note several references.

At the conclusion of the reading of the report by the Clerk
458 Mr. Watts continues as follows:—

"From my intimate knowledge of that section of the country, the Territory of Arizona alone will furnish to the circulating medium of the country $50,000,000 per annum in the articles that I have exhibited to you. * * * All this vast region of country I am now speaking about is lying idle and unproductive. It furnishes no capital to the country, for the reason that it is roamed over by the savage Indians, who come down upon the settlements and spread desolation and destruction. ,

An Italian sunset never threw its gentle rays over more lovely valleys or Heaven-kissing hills,—valleys harmonious with the music of a thousand sparkling rills, mountains shining with untold millions of mineral wealth, wooing the hand of capital and labor to possess and use it. The virgin rays of the morning sun first kiss the brow of its lofty mountains, and the parting beams of the setting sun linger fondly around their sublime summits, unwilling to leave to darkness and to night such beauty and such grandeur. If there be a single thought which lights up the oft times gloomy pathway of the faithful legislator, it is the sweet reflection that he has been instrumental in protecting the rights of a distant, feeble and oppressed people against the merciless barbarities of a powerful and treacherous savage foe. Let it not be said of us, that while we are ready to spend untold millions of money and thousands of lives to protect our own lives and property, the appeal of this distant people falls upon our bosoms

'Cold as moonbeams on the barren heath.'"

Mr. Watts' speech in his description of the territory was none too

flowery. He well knew the richness of the country, and especially that included in the present Baca Float No. 3; he was acquainted with its valleys, with its mountains and plains, with its agricultural lands. He was no doubt intimately conversant with its mineral-bearing veins, which traverse the Float its entire width. When he spoke of the Heintzelman Mine, although it is not embraced within this selection, it is still on the same mineral-bearing lead, ten to fifteen miles southwesterly from Tubac. He knew Poston,—
459 the same Poston spoken of here and in the several depositions.
He was not ignorant of the fact that the men who were extracting valuable minerals from this locality were doing so at the sacrifice of their lives. He does not speak of the Salero and the contiguous property, but in his selection, the northeast portion of the Grant; the mineral belt surrounding Salero Hill was the country that must, at any sacrifice, be included in the selection and saved to the Baca heirs. Why did they select the base of the Salero Mountain as the initial point of survey, when many other conspicuous places or objects, natural or otherwise, were available,—Tubac, the Tumacacori Mission, or a peak of the San Cayetano Mountains, for instance? No, this risk must not be taken, for accidentally he might omit from the selection the vast riches of the Salero District. He would therefore make Salero Hill the initial point. Their second selection, farther north and east, eliminated almost all the ground included in the first selection, but the country surrounding Salero Hill was not lost sight of, and the second selection embraced the whole southwesterly portion thereof. The "selector" had not lost sight of the future and the riches it might have in store for him. He remembered the tales of the phenomenal wealth of this country. Perhaps his speech made before the 37th Congress was still fresh in his memory; he knew that Federal aid had been promised and would soon be at hand; troops would invade the country and drive therefrom the blood-thirsty and renegade Apaches. Then, with the Salero country in his possession, and the Apaches forever sub-
460 dued, he and his followers would return to reap their reward, by extracting the valuable ore from these mines.

From the foregoing depositions, and those of William P. Blake (Exhibit No. 1) and George Clark (Exhibit No. 11), and the several extracts,—and I have every reason to honestly and candidly believe that they are true,—together with investigations made by me in person during the progress of the survey, my recommendations in the premises as to the two questions to be investigated and determined by me,—First,—as to the known character of the lands at the date of selection or location, June 17th, 1863, and Second,—as to whether the said lands were vacant and unoccupied, (eliminating those lands embraced within the unconfirmed portion of the San Jose de Sonoita and unconfirmed Tumacacori and Calabasas claims, as lands embraced therein were in a state of reservation), are as follows,—

1. (*a*) The lands within the Baca Float No. 3, which Deputy Contzen was instructed to segregate therefrom by Special Instruc-

tions dated June 17th, 1905, were notoriously mineral in character at the date of the selection, and are not subject to the Baca Grant.

(*b*) The balance of the lands embraced in said selection, excluding lands embraced in other Grants, is generally mineral in character, was so known in June, 1863, and prior thereto, sufficient evidences are to hand and herewith transmitted, independent of my own observations, to conclusively bear out this statement.

461 2. The lands embraced in this selection that were not known to be mineral were occupied and not vacant at the time of the selection and are therefore not subject to the Grant.

Therefore, after mature deliberation, it is recommended that this selection be rejected in its entirety, as not being subject to the provisions of the Act of June 21st, 1860, supra. In addition to the depositions I enclose a small map,—Exhibit No 15—showing the survey of the Baca Float, and the mineral segregated strip, and a map,—Exhibit No. 16,—showing the Santa Rita Mountains, with respect to the Baca Float, and a map of that portion of Arizona,—Exhibits No. 17,—showing the Gadsden Purchase, with the position of its silver mines, as marked in 1859, and a book of photographs.

Respectfully submitted,

FRANK S. INGALLS,
U. S. Surveyor General.

To the Commissioner of the General Land Office, Washington, D. C.

(Here follows drawing marked p. 462.)

463 DEFENDANTS' EXHIBIT No. 51.

Counsel for defendants offer in evidence duly certified copy of a letter dated May 13, 1907, from the Assistant Commissioner of the General Land Office to the Surveyor-General of Arizona, the same being exemplified from the press copy of the original of said letter on file in the General Land Office; and mark the same "Defendants' Exhibit No. 51."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 51 (except in so far as it may contain admissions against interest on the part of defendants and in favor of plaintiffs), on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a copy of a copy, and no foundation has been laid for the introduction of such a paper; for the further reason that it is not evidence of the facts therein stated; and for the further reason that it is dated May 13, 1907, whereas title vested in the heirs of Baca April 9, 1864, and the jurisdiction of the Land Department over said lands then ceased; and at the time said letter was written the Land Department had no jurisdiction or authority to consider or act upon the report of the Surveyor-General, or the plat accompanying said report, except to see that the plat correctly showed the exterior boundaries of the selection of June 17, 1863, and their connections with the lines of the public surveys, and that the said

plat complied with the formal requirements as to surveys of the public lands.

464 "B." DEPARTMENT OF THE INTERIOR,
M. E. L. GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 22, 1910.

I hereby certify that the annexed copy of office letter dated May 13, 1907, is a true and literal exemplification of the press copy of said letter in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD.
Recorder of the General Land Office.

465 W. H. L.

K. DEPARTMENT OF THE INTERIOR,
A. D. H. GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 13, 1907.

Address only the Commissioner of the General Land Office.

Baca Float No. 3.

Holding Report of Surveyor General to be Showing Against the Validity of the Entire Selection.

The U. S. Surveyor General, Phœnix, Arizona.

SIR: I am in receipt of your report and recommendation of November 5, 1906, in the matter of the survey of Baca Float No. 3 recently completed.

You were directed to let a contract for this survey by letter "G" of January 12, 1905, and with said letter was enclosed a copy of letter "G" of November 10, 1904, addressed to the Secretary of the Interior and requesting authority for the survey, and also a copy of instructions of December 28, 1904, from the Secretary, authorizing the said survey. Said departmental instructions directed that the survey should be executed in accordance with directions heretofore given (29 L. D., 44, 53-54; 30 L. D., 97, 105).

You were advised that it would be observed from the decisions cited that the duty of investigating and determining, in the
466 first instance at least, the character of the lands involved rested upon you, and that such investigation should be conducted and determination made as the work progressed in the field; that it was your duty also to determine what lands covered by the Baca location were occupied or claimed under private land claims at the time of the location of the float in 1863; and that such lands as you should find to be mineral or were occupied or claimed, as indicated, on June 17, 1863, the date of the selection, should be excepted from the survey of the Baca claim as not subject to selection.

The survey of the said location has been repeatedly refused until the claimants should deposit sufficient money to cover the expense thereof. No deposit was made by claimants and the said survey was authorized by the Department for the purpose of enabling this office to properly administer the public land laws, as without such survey it could not be determined what were public lands and what lands were included within the location.

The plat of the survey of this float, made by Philip Contzen, under contract No. 136, dated June 17, 1905, shows a mineral segregation at the northeast corner of the location of 8,656 acres, which segregation embraces Salero Hill. Said survey also shows as segregated from the survey the rejected Tumacacori and Calabasas grants, the confirmed San Jose de Sonoita grant, and the townsite of Tubac, there being left a net area in the location of said Baca Float No. 3 of 60,180.33 acres, the aggregate area being 99,289.27
467 acres.

Your report concludes (1*a*) that the said lands within the said float which said Deputy was instructed to segregate therefrom by your special instructions dated June 17, 1905, were notoriously mineral in character at the date of the selection and are not subject to the Baca grant; (*b*) the balance of the lands embraced in said selection, excluding lands embraced in other grants, is generally mineral in character, was so known in June, 1863, and prior thereto, sufficient evidence being at hand and transmitted with your report, you state, independent of your own observations, to conclusively bear out this statement; (2) the lands embraced in this selection that were not shown to be mineral were occupied and not vacant at the time of the selection and are, therefore, not subject to the grant.

Therefore, after mature deliberation, you recommend that this selection be rejected in its entirety as not being subject to the provisions of Sec. 6 of the act of June 21, 1860, (12 Stat., 71).

The matter of the survey and location of this grant has been a number of times before the Department and the action taken therein will be seen by reference to the departmental decisions of June 15, 1887, (5 L. D., 705); June 24, 1891, (12 L. D., 676); November 28, 1891, (13 L. D., 624); July 25, 1899, (29 L. D., 44); June 30, 1900, (30 L. D., 97) and March 5, 1901, (30 L. D., 497).

By these several decisions it has been established (1) that there has not heretofore been any ascertainment as to whether, on
468 June 17, 1863, the land then selected in satisfaction of this grant was vacant and not known to be mineral; that the ascertainment of these facts rests primarily with the Surveyor General; that such ascertainment could not be had without a survey of at least the exterior boundaries of the tract, but that it should be made in connection with such survey, and (2) that the land within the claimed limits of the Tumacacori and Calabasas, and of the San Jose de Sonoita claims are to be excluded from such survey.

The claimants under the float location and those claiming in opposition thereto were heard in oral argument at this office on May 7, 1907, and the float claimants have in addition submitted written arguments. In such arguments the float claimants have not sought to controvert the conclusions of fact stated in your report, but have

rested upon the contention that the prior decisions of the Department and of this office in the case were erroneous; that the questions as to whether the land embraced in their location was, on June 17, 1863, vacant and not known to be mineral, are res adjudicata, and that the land department has now no jurisdiction except to perform the mere ministerial act of making and approving a proper survey of the exterior lines of the tract and furnishing the claimants with evidence of their title thereto.

The arguments submitted and the authorities cited have been carefully considered, and I see no reason to question the cor-
469 rectness of the decisions heretofore rendered. I think it clear that the case has now reached the stage, where, for the first time, a determination can be had as to whether the tract claimed under the location of the float, was, at the date of such location, vacant and unoccupied, and not then known to be mineral in character; that you were charged with the duty of making such determination in the first instance, and that, having rendered your decision thereon, such decision, with the data submitted by you in support thereof, is now properly before this office for consideration.

Your conclusion is based on your own examination of the tract in question, and on a number of affidavits either taken by you or submitted to you by those opposed to the allowance of the float location. Such affidavits, with the facts stated by you as of your own observations are voluminous and cannot be here set out in detail. They have been carefully considered and are found to make such a showing as to support your conclusions. But the claimants under the float location, although notified by publication that the survey was being made, and that you would as it progressed make inquiry to ascertain the condition and known character of the land at the date when the location was applied for, have submitted no evidence as to any portion of the tract. It is therefore thought proper that before a final conclusion is expressed they should be given an opportunity to submit evidence as to the facts if they should desire to do so.

You will, therefore, notify the said claimants that they will
470 be allowed sixty days from notice to apply for a hearing before you, at which they may introduce evidence to disprove your findings as to the known character of the land on June 17, 1863, and the opposing claimants may produce evidence in support thereof; that in default of an application for hearing by them, or of appeal herefrom, within the time specified, your findings will be accepted as correct and the entire selection will be finally rejected. You will also give notice hereof to those claiming against the float.

Observe 29 L. D., 649, and in due time make report.

A detailed examination of the correctness of the lines of the survey has not yet been made by this office, this matter being held open pending consideration as to the validity of the selection.

Very respectfully, FRED DENNETT,
Assistant Commissioner.

H. J. GRAY.
E. C. FINNEY.

A. D. H.

471 DEFENDANTS' EXHIBIT No. 52.

Counsel for defendants offer in evidence duly certified copy of a decision dated June 2, 1908, signed by the First Assistant Secretary of the Interior, addressed to the Commissioner of the General Land Office, on file in the General Land Office; and mark the same "Defendants' Exhibit No. 52."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 52 (except in so far as it may contain admissions against interest on the part of defendants and in favor of plaintiffs), on the ground that it is incompetent, irrelevant and immaterial, for the reason that it purports to be a copy of a decision of the First Assistant Secretary of the Interior Department, which is reported in Land Decisions, and is not admissible as evidence; for the further reason that it is not evidence of the facts therein stated; and for the further reason that it is dated June 2, 1908, whereas title vested in the heirs of Baca April 9, 1864, and the jurisdiction of the Land Department over said lands then ceased.

472 B.
M. E. L.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 29, 1910.

I hereby certify that the annexed copy of Departmental decision dated June 2, 1908, in the case of Baca Float No. 3, is a true and literal exemplification from the original in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

H. W. SANFORD,
Recorder of the General Land Office.

473 W. S. A. F. H. B. F. W. C. C. E. W.

D–549.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *June* 2, 1908.

107,654.

Registered G. L. O. Jun- 4, 1908.
Promulgated—Received Jun- 4, 1908. G. L. O.
Answered by A. D. H., 8/13/08.

In re Baca Float No. 3.

Appeal.

The Commissioner of the General Land Office.

SIR: This is an appeal from your office decision of May 13, 1907, affirming the report and recommendation of the Surveyor General of Arizona, dated No. 5, 1906, in the above entitled case, involving title to nearly one hundred thousand acres of land situated in the

Gadsden Purchase, and being the third of a series of five locations, in square form, each containing 99,289.39 acres, of land in lieu of certain claims to a tract also claimed by the town of Las Vegas, authorized to the heirs of Luis Maria Cabeza de Baca by the 6th section of the Act of June 21, 1860 (12 Stat., 71).

Said section is as follows:

That it shall be lawful for the heirs of Luis Maria Baca,
474 who makes claim to the said (same) tract of land as is claimed by the town of Las Begas (Vegas), to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. And it shall be the duty of the Surveyor General of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them; Provided, however, that the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

Four of these tracts have been selected and surveyed and are not in dispute: Nos. 1 and 2 being located in what is now New Mexico; No. 4 in what is now Colorado; and No. 5 within the confines of Arizona.

The situs of Float No. 3 was selected by the heirs of Baca on June 17, 1863, but no survey thereof was made until 1905, when the Surveyor General reported, among other things, that the lands within the grant were notoriously mineral in character on June 17, 1863; that the Tumacacori, Calabazas, and San Jose de Sonoita grants as well as the townsite of Tubac fell partly within the exterior lines of the selected tract; and that the land was neither shown to have been non-mineral nor vacant at the time of selection. Hence he recommended that the selection be rejected in its entirety. Whereupon you directed said officer to allow the claimants sixty days after notice within which to apply for a hearing and to present evidence rebutting the findings of the Surveyor General; in default whereof, or of an appeal from said order, the entire selection would be finally rejected.

It is from this order that the present appeal lies. It is contended:

475 1. The Department is without jurisdiction in the premises.

2. That its construction of Section 8, Act of July 22, 1854, in Baca Float No. 3 (30 L. D., 97 and 497), is erroneous;

3. That its present construction of Section 6, Act of June 21, 1860, is erroneous; and

4. That the Commissioner erred in not approving the survey of said location as the survey of the grant to the Baca Heirs made by Congress on said June 21, 1860.

In one form or another this case has been before the Department a number of times. Six reported decisions present various aspects of this remarkable litigation: 5 L. D., 705, 12 L. D., 676, 13 L. D., 624, 29 L. D., 44, 30 L. D., 97 and 497. Commenced not so many years after the establishment of this Department, it has grown in importance and in intricacy until now, aside from title to a tract of

land more than twice the area of this district of Columbia, vast mineral wealth and the rights of a multitude of settlers, adversely claiming, are involved, dependent upon the final decision of this controversy.

The effectiveness of appellant's contention depends upon whether or not the Department has exhausted its jurisdiction in rem; whether or not the rights of the locators have vested and the legal title to the land covered by this Float has passed out of the United States. If it is true that at some stage in the proceedings, the initial act of which was the selection of June 17, 1863, the com-
476 plete requirements of the granting act were met, then the Department has not the power to issue the order from which the appeal lies.

Three propositions are advanced by appellants:

1. That the grant made by the act of June 21, 1860, was completely effectuated when the selection was made and notified to the Surveyor General; or

2. That, if the above be not the last act required, the approval of the Surveyor General vested the legal title in the claimants; or, finally, if more is required by the implied terms of the act,

3. That the action of the Commissioner of the General Land Office, on April 9, 1864, was an adjudication of title in the grantees.

The action of April 9, 1864, was an order issued to the Surveyor General by your office, directing the survey of the tract—later to be discussed in this decision.

The fourth and last possible act would be the survey, the certification of the plat, and the filing of the same in the Land Office. Whether this is an act required in the investiture of title is the crux of the present controversy. If title does not pass until there is a survey, a plat certified, returned, and approved, then the Secretary still has jurisdiction to enquire into all matters involved in the passing of title, including the known character of the land at the time of its selection.

There can be little merit in appellant's contention that title passed at the conclusion of the first or second steps; i. e., upon selec-
477 tion by the claimants or upon the approval of that selection by the Surveyor General. For if that be true, then these grantees have no claim and never have had a lawful claim to the land selected on June 17, 1863; because the selection on that date was not the first attempt to locate Float No. 3. It appears from the record that on October 31, 1862, John S. Watts, in behalf of the Baca heirs, filed the third of the series of selections, on land on the River Pecos, a place known as Bosque Redondo, situated in New Mexico. The Surveyor General certified that the tract was vacant and non-mineral and approved the selection. Further evidence of its vacant and non-mineral character was afforded by the certificate of the Register and Receiver. The Commissioner of the General Land Office was duly notified of the selection. But before any action was taken by the Commissioner, an order for its survey issued, the agent of the heirs, with permission from your office, withdrew the selection. Permission was thus given because the application had

not "ripended into a specific location." Now if the "last act" required by the terms of the grant, expressed or implied, was the approval of selection by the Surveyor General, it is quite clear that the only location of Float No. 3 to which the heirs or assigns of the grantees now have any legal claim, is that of October 31, 1862—the Bosque Redondo land; that is, their rights were exhausted prior to the selection of June 17, 1863, and the selection of that date was consequently ineffective for any purpose.

478 It is quite clear that something more was required to invest title. The terms of the act itself confer a right in the heirs "to select vacant land, not mineral," to be located by them in square bodies, within three years from the passage of the act. The act furthermore lays a duty on the Surveyor General—"to make survey and location of the lands so selected by said heirs of Baca." No limitation in time was imposed for the performance of this duty.

It is plain that the statute cannot be confined to its express terms. As in other cases, Congress did not descend into the minutiae of detail. The officer charged with the execution of the legislative mandate perforce by regulations properly derivative and within the scope of the act, was bound to supply the administrative details. The grantees were not empowered to take any land with merely the limitation of area. The land, so the expressed terms of the act required, was to be vacant and non-mineral. Somewhere there was, by necessary implication, a power to decide whether the land so selected was vacant and non-mineral; somehow, and this again by implication rather than expression, the character of the land was to be determined. It was the duty of the Surveyor General, "in the first instance at least" (Shaw v. Kellogg, 170 U. S., 312), to say whether the land thus selected was within the terms of the grant.

Thus we find that on July 26, 1860, your office issued instructions to the Surveyor General of New Mexico, calling attention to the act in favor of the Baca heirs and directing:

479 Should they select in square bodies according to the existing lane of survey, the matter may be properly disposed of by their application duly endorsed and signed with your certificate designating the parts selected by legal division or subdivision, and so selected as to form five separate bodies in square form. Then the certificate thus endorsed is to be noted on the records of the Register and Receiver of Santa Fe and sent on here by these officers for approval. Should the Baca claimants select outside of the existing surveys, they must give such distinct descriptions and connection with natural objects in their applications to be filed in your office, as will enable the Deputy Surveyor when he may reach the vicinity of such selections in the regular progress of surveys, to have the selections adjusted as near as may be to the lines of the public surveys, which may hereafter be established in the region of those selections.

In either case the final conditions of the certificate to this office must be accompanied by a statement from yourself and Register and Receiver that the land is vacant and not mineral.

This was a necessary and reasonable regulation in no way restric-

tive of the terms of the grant and in every way derivative from the act itself, and essential in its execution. As such, it clearly had the force of law.

"What is allowed to be done is anything within the law that is in execution of it; what is forbidden to be done is anything without the law that is in extension of it." Wyman on Administrative Law, Sec. 99, U. S. v. Eaton, 144 U. S., 677. In re Kollock, 165 U. S., 535.

Whether the location was upon surveyed land, or unsurveyed land, the certificate of selection, in either case, after notation on the records of the local land office, was to be sent to the General Land Office for approval, accompanied by a statement from the Surveyor General, the Register, and the Receiver that the land was vacant and not mineral. The selection was to be certified locally
480 and afterwards approved in Washington; if unsurveyed, a survey was evidently to follow the approval; if surveyed, it would seem that no further action was necessary, neither the act nor the regulations so providing.

John S. Watts, attorney for the Baca heirs, filed his selection of the land in controversy June 17, 1863, describing it by courses and distances from an initial point definitely located with reference to a natural object, Salero Mountain. On the same day, the Surveyor General certified the selection, concluding his certificate with the sentence, "Said location is hereby approved." Under date of June 18, he forwarded a copy of the application and certificate to your office, stating:

As this location is far beyond any of the public surveys, I have not deemed it necessary to procure any certificate from the Register and Receiver of the Land Office, as from the nature of the case, they cannot officially know anything concerning it.

A month later, he was notified that his "approval of the location * * * ignored the imperative condition that the land selected * * * is vacant land and not mineral." Therefore, "before the application * * * can be approved by this office, it is necessary that our instructions of the 26th of July, 1860, should be complied with by furnishing a statement from yourself and Register and Receiver that the land thus selected * * * is vacant and not mineral."

To this the Surveyor General, then in Washington, replied (April 2, 1864) that there was no evidence in his office that said selected tract "contains any mineral or that it is occupied." As he
481 was personally unacquainted with that region of the country, he could not "certify that the land in question is vacant and not mineral or otherwise." "Those facts," he added, could "only be determined by actual examination and survey."

The Register and Receiver were not so unwilling to certify to the character of the land. On March 25, 1864, the former certified that the lands "from all information in this office are vacant and not mineral." The latter said that they were "vacant and not mineral so far as the records of this office shows (not having been surveyed)." The Surveyor General, however, did not pass upon the character of the land. If he, "in the first instance at least," was

bound to decide whether the land was vacant and non-mineral, such a decision is entirely lacking in this case.

Arizona, in the meantime, had been set apart from New Mexico as a separate Territory. On April 9, 1864, the Commissioner of the General Land Office issued the following instructions to the Surveyor General of the new Territory:

By an examination of the papers herewith inclosed relating to the third of the series of the Luis Maria Baca grants * * *, you will perceive that the location of the one-fifth part of said grant as set forth by the claimants has been approved by the Surveyor General of New Mexico, under whose jurisdiction the application properly came at the date of the approval.

After speaking of the statute and the duty therein imposed upon the Surveyor General to survey the tract "when required by said heirs," and of the effect of the act of June 2, 1862, requiring surveys to be at the expense of the claimants, the Commissioner, "in
482 order to avoid delay," authorized the Surveyor General to contract with a competent deputy whenever the claimants deposited a sum sufficient to cover the expense, "and have the claim numbered 3 of the series surveyed as described in the inclosed application."

Transcripts of the field notes and plats certified in accordance with the requirements of the law will be transmitted to this office and will constitute the muniments of title, the law not requiring the issue of patents on these claims.

Specific instructions as to the erection of proper monuments follow.

In conclusion the Commissioner said:

The foregoing statement and the certificate of Surveyor General Clark having been submitted to this Department, and having undergone a careful examination, the location being approved by him to perfect title under the authority of the act approved June 21, 1860, application for survey having been made, instructions (copy herewith attached) have been given to Surveyor General Levi Bashford of Arizona in which Territory the lands located now are, to run the lines indicated and forward complete survey and plat to be placed on file for future reference as required by law.

But the survey was not made for over forty years. A number of causes account for it. Mr. Watts soon after the order for survey as aforesaid attempted to amend the application by changing the initial point. Subsequently others claiming as heirs of Baca also attempted to re-locate the claim, attacking their own title for this purpose by alleging that it had been discovered that the Salero location (June 17, 1863) covered minerals. An attempt to secure legislation in the early '80's failed. Former decisions in this case detail
483 sufficiently this part of its history, which need not be repeated. It is now recognized and so held that the heirs and their assigns are held to the location of June 17, 1863. One application for re-location, however, does not appear in the printed record of this litigation—that of the son of Mr. Watts who, in 1877, requested permission to re-locate because his father's "location was disapproved by your office on account of its being mineral or for absence of proof that it was not mineral."

To this the Commissioner replied:

Some correspondence has been had by this office relative to the character of the land embraced in said location whether the same was non-mineral as required by the 6th section of the Act of June 21, 1860, but I do not find that said location was disapproved by this office, but on the contrary, instructions were subsequently given, May 21, 1866, for the survey according to the amended application of Mr. Watts of April 30, 1866.

If the action of April 9, 1864, were a finality, and title to the location of June 17, 1863, then and there passed to the locators, what authority existed for the allowance of the modification of the application by changing the initial point of the location? If the "location" by the grantees alone sufficed, the location would have ceased then and there to be a "float:" the "initial point" would have ceased to be movable at the caprice of the grantees, with the indulgence of the Land Office, and the selection itself would have become more than a mere geographical expression—a known, delimited tract, segregated from the public domain and removed from the jurisdiction of this Department.

Bearing upon the general question, the procedure with
484 reference to the other "floats" is pertinent.

On December 8, 1860, Surveyor General Wilbur certified the selection covered by Float No. 1, on land near Valles Grandes, N. M., "which I believe is not mineral and which is vacant." He approved the selection. The Register and Receiver stated that the surveyed portion was "vacant and not mineral according to the plats on file in this office," but a portion being unsurveyed, "consequently we can give no certificate concerning it." On May 24, 1871, survey was ordered "to be made in accordance with said application for location." Survey was duly made, the certified plats and field notes filed as required by the regulation, and accepted, and title to this tract has long since passed to the claimants. But, it will be noted, prior to the survey there were not in the case, as to a portion of the selected tracts, the certificates required by the regulations regarding the character of the land or the vacancy of the same, and hence there could have been no final adjudication there or at Washington, at any time before the survey, that the selected tract was, as to its entirety, within the terms of the grant.

Float No. 2 was selected December 15, 1860. The Surveyor General certified that from the best information he could obtain the land was vacant and non-mineral. He approved the selection save as to two sections released by the heirs to the Government. The Register and Receiver certified that the surveyed portion was vacant and non-mineral with certain exceptions (land preempted prior to location) and that from the best obtainable information the unsur-
485 veyed portion was also vacant land not mineral. Survey was ordered, the land was surveyed and the plats certified and filed September 27, 1861. This tract has never since been in dispute. Here was also a complete adjudication on all points.

Float No. 5 was first located near the Fort Sumner reservation in New Mexico. By act of Congress of June 11, 1864 (13 Stats., 125), the heirs were authorized "to raise and withdraw the selection and

location" and "to select and re-locate the same, in the manner provided by said act," at any time prior to June 21, 1865, "upon any of the public land, unoccupied and not mineral" within New Mexico. Upon such "selection and re-location," the title "shall be, and is hereby, confirmed to said heirs * * * as fully and perfectly as if the same had been selected and located" prior to June 21, 1863. Section 2 of the act provided that upon such selection and relocation "all right, title, and interest" in the land previously selected near the Fort Sumner reservation, was to be thereby "divested and declared null and void, and the same shall revest in the Government of the United States." The new selection thus authorized was notified to the Surveyor General, May 6, 1865. It included land at Francis creek, between Fort Mojave and Prescott, which Mr. Watts represented to be "non vacant and not mineral." Under date of June 7, 1865, Surveyor General Clark approved the location and wrote as follows to your office:

The tract of land described in the appliction is far beyond any of the public surveys and I knew personally nothing what-
486 ever about it, nor have I any information concerning it except the statement in the application of Judge Watts, a copy of which is enclosed. There is no evidence in this office that the tract located as above is mineral or that it is occupied nor any record relating to it of any character whatever.

The Commissioner notified him, August 14, 1865, that no survey could be authorized until evidence was obtained by him showing the land to be non-mineral and unoccupied. To this, September 14, 1865, the Surveyor General replied as follows:

On the 17th of June, 1863, Judge Watts as attorney for the heirs of Baca located one-fifth of the claim confirmed to them, at the Salero Mountain in Arizona (No. 3). A certified copy of the application to locate, with my approval, was transmitted to your office with my letter of 18th of June, 1863. In reply to your letter of July 18, 1863, requesting a statement from myself and the Register and Receiver of the Land Office, that the land located (No. 3) was vacant and not mineral, I stated, in substance, (in my letter of April 2, 1864) that there was no evidence in this office that the land in question was occupied or mineral or otherwise and that I had no personal knowledge concerning it. Upon receipt of that statement and without any proof concerning the occupancy or character of the land (as I understood at the time), Mr. Bashford, the Surveyor General of Arizona, was instructed to cause the location to be surveyed upon receipt by him of the estimated cost of the survey, etc.

It having been decided by your office that no patents are to be issued in these cases, and your having ordered the survey of location No. 3 as above, I supposed that the rule requiring proof of the character of the land, and as to whether it is occupied or not, had been rescinded, and therefore have not required of the parties (No. 5) any proof whatever.

He then called attention to the following certificate, a copy of which is enclosed:

We hereby certify that we are well acquainted with the land de-

scribed in the foregoing boundary located in the name of the heirs of Luis Maria Baca and that the same is unoccupied and not mineral.

New York, 1 May, 1865,

CHARLES D. POSTON.
JOHN MOSS.

487 These gentlemen were agents of the Baca heirs. On November 10, 1865, the Commissioner refused to accept this as sufficient "to enable us to base our official action thereon and therefore no definite proceedings in reference to the survey of the claim is indicated to you." But on May 23, 1866, the Commissioner wrote that the views of his office "respecting the final proceedings on your part in causing the survey to be made of the aforesaid claim, are hereby modified and you are authorized to have the claim surveyed."

The authority thus given you for the survey of the fifth location of the claim is accompanied with the proviso that the out boundaries of the grant will embrace vacant land not mineral as provided in the 6th section of the act, etc.

Authority was given for the survey, but no adjudication as to the availability of the land for selection was made. On the contrary, the vacant, non-mineral, character of the land was expressly left open, apparently to be determined, so far as local officers were concerned, upon survey; for the authority given was subject to the proviso that the "fifth location" should not embrace the occupied or mineral land. In 1877, the selection was surveyed and in certifying the field notes, the statement that the land "is entirely of a non-mineral character" was expressly made. In 1898, a patent was issued—the Land Office receding from its position that no patent could be issued because the act did not specifically so require. The adjudication of the character of the land could not have been made prior to survey in this case.

488 It is unnecessary to repeat in detail the proceedings in relation to Baca Float No. 4, for the decision in Shaw v. Kellogg, 170 U. S., 312, contains a very full statement of the facts. Briefly:—The selection was filed December 12, 1862, in the office of the Surveyor General of New Mexico, who forwarded a copy to Washington and to the Surveyor General of Colorado within whose district the land was located. The latter, February 24, 1863, wrote the Commissioner that he supposed this location was one made by ex-Gov. Gilpin who told him "last summer" that he would locate one of these "floats" as this is located for the reason that, in his opinion, it would cover right minerals in the mountains." This officer was very promptly informed that before "the application can be approved by this office," certificates from him and the Register and Receiver to the effect that the land was vacant and not mineral must be furnished. Especial care was to be exercised in ascertaining the facts in view of the "important statement of ex-Governor Gilpin." Later, the last mentioned gentleman applied to the Surveyor General for a survey. The latter made a contract with a deputy surveyor and forwarded the same to your office for approval. On November 2, 1863, the contract was disapproved and the Surveyor General

notified that the certificates aforesaid must be furnished. Whereupon (December 12, 1863) he and the local land officers certified "that from good and sufficient evidence" they were "perfectly satisfied that the land * * * located * * * and marked out by a survey made by * * * Sheldon in November, 1863, is not mineral and is vacant." This was not accepted as sufficient (Jan.
489 16, 1864). But on February 12, 1864, the General Land Office reconsidered the matter. Criticising the Surveyor General for refunding the deposit of Mr. Gilpin (for cost of survey) and allowing him to pay for the Sheldon survey as a "private survey," the Commissioner stated that the difficulty might be avoided by pursuing this course: The original field notes, duly verified and authenticated, were to be filed in the Surveyor General's office, and were then to be brought "to the usual satisfactory tests;" if regular and correct the Surveyor General was "authorized in virtue of the aforesaid sixth section of the said act of 21st of June, 1860, to approve the said survey." He was further instructed to make his approval subject to the condition that the land should be non-mineral and vacant—a condition which the court held was beyond the power of executive officers to impose. The field notes were thus approved by the Surveyor General and forwarded to your office March 29, 1864. No action whatever was taken in relation to the field notes, etc., beyond the bare acknowledgment, May 4, 1864, that they had been "received at this office."

The court held that the title had passed to the grantees. The main thing in controversy in that case was not at what particular point in the proceedings title actually passed, but whether or not when it did pass the Land Department had any authority to impose any condition or limitation. It was therefore not essential to decide exactly at what point the Government lost its title to the land. The court dwells more especially upon the evidence of the fact
490 that at some point in the proceedings title flowed from the Government to the grantees. The filings of the approved field notes of survey was certainly final as an evidential fact; but was it the final act, of statutory requirement, short of which there was no divestiture of title? Was it more than the counsel for appellants claim and than the Commissioner intimated in his letter to the Surveyor General—that his "plat approved in the manner indicated will therefore constitute the evidence of title," or, as he said in relation to Baca Float No. 3, the "muniments" of title?

Certainly, so far as the express terms of the act are concerned, there was no other way of evincing the passing of title and of definitely delimiting and publishing to the world exactly where and what the granted land was. A fair construction to be placed upon the language of the Commissioner is that he was merely reciting a fact and not pronouncing judgment as to the exclusive effect that the return of the certified plat and field notes would produce.

In Baca Float No. 4, the survey was made in November, 1863; the certificates concerning the character of the land, etc., in December, 1863; the act of the Commissioner in directing the manner of final disposition of the case, in February, 1864; and the final act of the

Surveyor General in approving the plat and field notes and in forwarding them to the General Land Office in March, 1864. These dates are of significance in acquiring a correct understanding of what the Supreme Court had in mind in speaking of the duty and action of the Surveyor General:

491 How was the character of the land to be determined, and by whom The Surveyor General of New Mexico was directed to make survey and location of the lands selected. Upon that particular officer was cast the specific duty of seeing that the lands selected were such as the Baca heirs were entitled to select. * * * We do not mean that Congress thereby created an independent tribunal outside of and apart from the general Land Department of the Government. On the contrary, the act of 1854, provided that he should act under instructions from the Secretary of the Interior, and so undoubtedly in proceeding to make survey and location as required by section 6 of the act of 1860, he was still subject to the control and direction of the Land Department; but while he was not authorized by this section to act in defiance or independently of the Land Department he was the particular officer charged with the duty of making survey and location, and it was for him to say, in the first instance at least, whether the lands so selected, and by him surveyed and located, were lands vacant and non-mineral. This is in accord with the views of the Land Department, as appears from the official letter of June 28, 1884, * * * "You will see by the foregoing that the land in question was determined, in 1864, by the Surveyor General, whose province and duty it was, to be non-mineral; the location was then perfected and the title passed."

* * * * * * *

It will also be perceived that the Surveyor General, as well as the Register and Receiver of the land office, each certified that the land was non-mineral. These certificates were their decision to that effect. They were made in accordance with the original instructions sent out by the Land Department in July, 1860, and in this respect they were all that was required by those instructions, which were "in either case (that is, whether the selection is either within or without the existing surveys) the final condition of the certificate to this office must be accompanied by a statement from yourself and the Register and Receiver that the land is vacant and not mineral." Thus the proper officer decided that the land was non-mineral, and accompanied the report of the survey and location with all the certificates and statements required by the original instructions from the Land Department.

The certificates required by the regulations constituted a decision on the part of the local officers, on the strength of which a survey might be ordered. That is, before the Land Department would be justified in taking or authorizing any final steps, a prima

492 facie showing as to the character of the land and its availability for selection was required. Apparent contradictions in the course of the decision in Shaw v. Kellogg are to be explained in the light of the peculiar conditions in that case—a survey preceding any certification by the local officers. There is no escape from

this conclusion, however: it was the action of the Surveyor General in 1864 and not his action of 1863 that amounted to an adjudication that the land selected was within the terms of the grant. However unsatisfactory his preliminary certification was, the court notes (p. 336) that when he "proceeded to approve the survey, his certificate of approval" was "absolute and unconditional," and the plat and field notes were duly filed.

But one conclusion can be deduced from the proceedings, and that is that the Land Department, perceiving that its original instructions had been strictly complied with; that no money had been appropriated by Congress for actual exploration of the lands; that no way was open for securing further evidence as to their character; that the time within which any other location could be made had passed; that it was the right of the locators to have the question settled and the title confirmed or rejected, ordered the closing of the matter, the passage of the title, etc.

Still bearing in mind that the court was dealing with a case where there had been a survey and an approval thereof by the party who in the first instance was charged with the adjudication of the questions initiated by the act of selection, the following excerpt from the opinion, rightly understood, is helpful:

Congress had made a grant, authorized a selection within three years, and directed the Surveyor General to make survey and location, and within the general powers of the Land Department it was its duty to see that such grant was carried into effect and that
493 a full title to the proper land was made. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time.

What time? Manifestly, in the light of the facts with which the court was dealing, at the time when all that was directed to be done had been done—selection, survey and location by the Surveyor General. No attempt was made in Baca Float No. 4 to attach any string to the grant until a survey had been made; and the qualifying terms, possibly in the future to effect a defeasance of title, were incorporated in the approval of the plat and field notes of the survey. This, the court held, was beyond the power of the Department; it was its duty finally to settle the question at that time, the time when the sole remaining thing to be done in passing title was the filing of the approved plat and field notes of survey "Undoubtedly it could refuse to approve a location on the ground that the land was mineral." What, then, if the plat and field notes showed that fact?

Take the case of Baca Float No. 5: Assume that the survey of 1877 had disclosed the fact that the surface of the enclosed area was encrusted with mineral wealth—and counsel in oral argument submitted that would — no difference—would the Land Department

be destitute of power to "refuse to approve the location on the ground that the land was mineral" in the face of its letter of May
494 23, 1866, when in giving directions for the "final proceedings" on the part of the Surveyor General, it directed that the "authority thus given" was "accompanied with the proviso that the outboundaries of the grant will embrace vacant land not mineral"? Did this cautious direction render the Land Department functus officio and would any court compel it to recover and deposit as a "muniment of title" the certified plat and field notes showing that the land was not only partly occupied but notoriously mineral at the date of selection, and thus precisely the land which Congress in empowering the grantees to select excluded from *seltcion* by them and therefore from location by the Surveyor General?

Adverting to the act of June 21, 1860, in this connection, it is noted that Congress not only made it the duty of the Surveyor General to survey the land "so selected" but to "make * * * location" thereof as well. The expression is significant. In the first part of the act, the heirs are authorized to "select" vacant land not mineral "to be located by them in square bodies," etc. In the next sentence it is made the duty of the Surveyor General to survey and make "location." Why the recurrence in expression of this idea of location? If to the selector's act—his "location"—a perfunctory survey is merely to follow in order to furnish "muniment of title" (and this is appellant's case), the duty to "make * * * location" is a direction to perform a meaningless task: technical location has already been effected. But "located" was used by
495 Congress in another sense—in its usual colloquial meaning as a pointing out, a designation, of the tracts wanted—selected by the grantees. "Location," as the act of a government officer, in this statute, has a different meaning—a technical import, signifying the action by which the selected tract is segregated from the public domain and appropriated to the use of the grantee. In this sense the duty of making location is placed upon the Surveyor General and not upon the beneficiaries of the grant. It would be anomalous were it otherwise. If their act of selection, designating a certain tract and describing it by courses and distances from a known initial point, were sufficient to change the character of the enclosed area from public to private land—the survey later to be made merely for their convenience and to afford a muniment of a title already passed—there would indeed be some foundation for the contention of counsel, i. e., that it would make no difference even if the surface of the enclosed tract was rich with minerals; for legal title then passed and could only revest in the United States upon suit to recover the same on the ground that the location covered land excluded from selection by the terms of the grant. Congress certainly never intended that legal title should pass until there had been a determination by the proper authorities that the land selected was such as the granting act contemplated. Until then there could not be an official "location" effecting, if not disapproved by the superior officers of the Surveyor General, a segregation from the

public domain and an investiture of title in the grantees.
496 The act does not state exactly when this determination is to be made. The evidence upon which the Land Department is to adjudicate the question may be presented through certificates and by endorsement on a certified plat and field notes of a survey already made as in Baca Float No. 4, or left for determination, as in Baca Float No. 5, at the time of survey and location—the instructions for the making of which containing the proviso that the outboundaries should not include mineral land.

In 1863 or 1864, there had been no determination of the non-mineral character of Float No. 3. The Surveyor General refused to certify that the land selected was unoccupied or non-mineral and definitely stated that those questions could only be determined by a survey; whereupon survey was ordered. Nothing was said, it is true, by your office, as to such an investigation. But, it is evident, none of the parties regarded the order for survey a final and conclusive act, passing title from the Government to the claimants. For, as hereinbefore shown, the latter almost immediately sought permission to amend their application by changing the initial point of the selected tract, and when (and improperly) that was permitted, the letter of instructions for the survey of the amended selection (dated May 21, 1866) contained the same proviso noted in the case of Baca Float No. 5; viz: that the outboundaries indicated by the amended application should embrace vacant lands not mineral.

So far were the steps then taken regarded generally as in-
497 conclusive by the Land Department and by the claimants that the latter repeatedly sought in divers ways, through legislation and without, to avoid the selection of June 17, 1863, even going to the extent of alleging that the land then selected was mineral and not within the terms of the grant. Yet there was the order of survey upon their deposit of the necessary sum of money to cover the cost thereof—a survey which if the land was properly selected would long since have resulted in a location and passing of title to the claimants. That no survey was made until after forty years had passed is not the fault of the Government.

In striking contrast are the facts in respect to Float No. 4 as summed up by the court (p. 342):

Congress in 1860 made a grant of a certain number of acres, authorized the grantees to select the land within three years anywhere in the Territory of New Mexico, and directed the Surveyor General of that Territory to make survey and location of the land selected, thus casting upon that officer the primary duty of deciding whether the land selected was such as the grantees might select. They selected this tract. Obeying the statute and the instructions issued by the Land Department, that officer approved the selection and made the survey and location. The Land Department, at firs suspending action, finally directed him to close up the matter, to approve the field notes, survey and plat, and notified the parties through him that such field notes, survey and plat, together with the act of Congress, should constitute the evidence of title. All was done as directed. Congress made no provision for a patent and the Land Department

refused to issue one. All having been done that was prescribed by the statute, the title passed. The Land Department has repeatedly ruled that the action then taken was a finality. It has noted on all maps and its report that this tract had been segregated from the public domain and become private property. It made report of this to Congress, and that body has never questioned the validity of its action. The grantees entered into actual possession and fenced the entire tract. They have paid the taxes levied by the State upon it as private property, amounting to at least $66,000.

498 During all these years, the land selected on June 17, 1863, has been retained on maps and records as a part of the public lands; the grantees have never been in possession and have never paid a cent of taxes upon it as private property, but, on the contrary, until recent years have treated it as a piece of land unwisely selected but happily not so far appropriated by them in settlement of their claim as to prevent, if the Government would permit, a new selection elsewhere. All has not been done "that was prescribed by the statute," and hence title has not passed.

The Department holds that the final act by which title passes under the grant of June 21, 1860, is the acceptance by the Department and the filing of approved plat and field notes of a survey whereby the Surveyor General made location of the selection of lands affirmatively shown to have been vacant and non-mineral at the date of application so far as was then known by the selectors.

It is contended that the Department has erred in its construction of Section 8 of the Act of July 22, 1854, in holding (30 L. D., 97, id., 497) that the portion of the selected tract in controversy covered by the Tumacacori, Calabasas, and San Jose de Sonoita claims, were by operation of said section 8 in a state of reservation at the time of the selection of June 17, 1863, and thus not "vacant land" within the meaning of the act of July 21, 1860, although the claimants did not file their claims with the Surveyor General until after the filing of the application by the Baca heirs. Appellant urges

499 that there be no "claim" initiated until such was preferred to the Surveyor General and that until such action was taken, the land was public land; in other words, that through operation of said section 8 no land became "reserved" and therefore inappropriate while sub judice, until there had been a demand made therefore upon the proper officer—not, in this case, made until after the Baca claimants had acted.

The position taken by the Department (30 L. D., 97 and 497) is that the act of July 22, 1854, did not require any affirmative action on the part of those claiming under alleged Spanish or Mexican grants to place the land covered by these claims in reservation; that the statute, silent as to any demand being made on the part of the claimants, of its own vigor reserved such land from any appropriation until the validity of the Spanish or Mexican claims had been adjudicated.

The position thus taken, the Department is convinced, is sound. By virtue of the articles of the treaty of Guadalupe Hidalgo, alone,

no land contained within the claimed limits of any Mexican grant was reserved. (Lockhart v. Johnson, 181 U. S., 516). Withdrawals or reservations depended entirely upon legislative action—and the terms or conditions of said reservations necessarily upon the terms of the statute by which they were created. Thus, in respect to certain claims within the territorial limits of California, Congress, on March 3, 1851, provided that all lands, the claims to which should not be presented within two years therefrom, should "be deemed, held, and considered to be a part of the public domain of the
500 United States." This was notice to all claiming under a Mexican or Spanish grant to assert and maintain their claims within a certain time, before a commission for that purpose appointed, else the land claimed would become part of the public domain and consequently subject to other appropriation. A failure thus to assert or present the claim, or to prosecute, terminated the reservation; to perpetuate the reservation until there had been a final adjudication of the claim, the statute creating the reservation imposed a duty on the claimant to make a demand. (Newhall v. Sanger, 92 U. S., 761). But in the case at bar, the lands affected by the Tumacacori, Calabezas, and San Jose de Sonoita claims, were subject to another statute (Act of July 22, 1854), the terms of which, in creating the reservation, did not impose the duty of presenting a demand on the part of the claimants to the Surveyor General. It was the latter's duty "to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico." On him, apparently, was placed the initiative. And so from 1854 until the establishment of the Court of Private Land Claims by Act of March 3, 1891 (26 Stat., 854), the tracts embraced by the Tumacacori, Calabezas, and San Jose claims, irrespective of the validity of those claims, were not open for disposition by donation or otherwise as a part of the public domain. (Lockhart v. Johnson, 181 U. S., 516, 526). A fortiori, they were not subject to selection under an act which expressly excluded land that was occupied, such as the act of June 21, 1860. It follows
501 that such portions of the selection of June 17, 1863, as fall within the claimed area of these grants, were, on the date mentioned, excluded from consideration in the passing of title to the location as a whole.

The plat and field notes of the survey of Baca Float No. 3 recently made do not contain the approval of the Surveyor General. On the contrary, he refuses his approval on the ground that the area included in the selection of June 17, 1864, was at the date of said selection known to be occupied in part and mineral in character.

The order remanding the case for a hearing before the Surveyor General, if after notice appellants request the same, for the purpose of affording them an opportunity to present evidence in rebuttal of the adverse prima facie showing, will not be disturbed. If they default in applying for hearing within sixty days from notice of this order (and it will be the duty of the Surveyor General so to give notice to all parties in interest as required in your decision of May

13, 1907), the return of the said officer will be accepted as correct and the entire selection finally rejected.

In the event of a hearing, the land covered by the Tumacacori, Calabezas, and San Jose de Sonoita claims will, as aforesaid, be excluded from consideration and whatever may have been the known character (as to minerals and vacancy) in 1863 of said claims will not be given evidential weight, for or against the claimants, in determining the availability of the rest of the Float for selection.

502 If as a result of the hearing, the Land Department is satisfied that the land, excluding the reserved portions thereof, was not known to have been mineral or occupied at the time of selection, the Surveyor General, as in Baca Float No. 4, may be ordered to approve the survey and to file the plat and field notes to effect the passing of title to the claimants as well as to afford muniment of that title. Or, if the hearing develops as a fact that portions only of said Float were not available for selection in 1863, on account of having been then known as mineral in character or as occupied land, such portions may be so segregated by survey as to exclude them from the effect of an approval of the survey of the Float as a whole.

Certain other appeals by parties claiming interest in portions of the land embraced by the outboundaries of the Float are dismissed as the issues therein raised are herein determined.

The action below is affirmed.

The papers are herewith returned.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.

503 DEFENDANTS' EXHIBIT No. 53.

Counsel for defendants offer in evidence duly certified copy of a letter dated June 15, 1908, signed by the Acting Commissioner of the General Land Office, addressed to the Register and Receiver of the United States Land Office at Phœnix, Arizona, the same being exemplified from the press copy thereof on file in the General Land Office; and mark the same "Defendants' Exhibit No. 53."

504 "B" DEPARTMENT OF THE INTERIOR,
M. E. L. GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 22, 1910.

I hereby certify that the annexed copy of office letter dated June 15, 1908, is a true and literal exemplification of the press copy of said letter in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

505 K.

97019–1908. DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June* 15, 1908.

Address only the Commissioner of the General Land Office.
H. E. 3024, of Henry Ohm.

Notice to Submit Final Proof Returned with Instructions.

Register and Receiver, Phœnix, Arizona.

SIRS: Responding to your letter of May 14, 1908, the application of Henry Ohm to submit final proof on his H. E. 3024, made February 2, 1899, for the N. ½ of S. E. ¼, S. E. ¼ of S. E. ¼, N. E. ¼ of S. W. ¼, Sec. 9, T. 22 S., R. 13 E., is herewith returned. You will allow entryman to proceed with the making of said proof and if found satisfactory you will issue final certificate on the entry.

According to departmental decision of June 2, 1908, the rejected Tumacacori grant, within which this entry lies, is excepted from the location of Baca Float No. 3. Final action on said entry will not be taken in this office until the Baca Float decision has become final.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

E. A. FINNEY.

506 DEFENDANTS' EXHIBIT No. 54.

Counsel for defendants offer in evidence duly certified press copy of a memorandum dated January 6, 1909, prepared by A. D. Hathaway, clerk in Division "K" of the General Land Office, showing homestead, mineral, and other entries wholly or partly within the exterior limits of Baca Float No. 3, Arizona, the same being exemplified from the official press copy thereof on file in the General Land Office; and mark the same "Defendants' Exhibit No. 54."

507 DEFENDANTS' EXHIBIT No. 55.

Counsel for defendants offer in evidence duly certified copy of an original decision on file in the General Land Office, dated December 5, 1908, addressed to the Commissioner of the General Land Office, signed by the First Assistant Secretary of the Interior; and mark the same "Defendants' Exhibit No. 55."

Counsel for plaintiffs object to the admission of defendants' proposed exhibit No. 55 (except in so far as it may contain admissions against interest on the part of defendants and in favor of plaintiffs), on the ground that it is incompetent, irrelevant and immaterial, for the reason that it is a copy of a copy, and no foundation has been laid for the introduction of such a paper; for the further reason that it purports to be a copy of a decision of the First Assistant Secretary

of the Interior Department, which is reported in Land decisions, and is not admissible as evidence; for the further reason that it is not evidence of the facts therein stated; and for the further reason that it is dated December 5, 1908, whereas title vested in the heirs of Baca April 9, 1864, and the jurisdiction of the Land Department over said lands then ceased.

508 DEFENDANTS' EXHIBIT No. 56.

Counsel for defendants offer in evidence duly certified copy of a letter dated April 9, 1864, addressed to Levi Bashford, Surveyor-General of Arizona, signed by the Commissioner of the General Land Office, the same being exemplified from the record thereof in the General Land Office; and mark the same "Defendants' Exhibit No. 56."

509 B.
M. E. L.

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.
WASHINGTON, *April* 27, 1912.

I hereby certify that the annexed copy of office letter dated April 9, 1864, is a true and literal exemplification from the record of letters in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] JOHN O'CONNELL,
Acting Recorder of the General Land Office.

510 GENERAL LAND OFFICE, *April 9th*, 1864.

Levi Bashford, Esq., Surveyor General, Tucson, Arizona.

Location No. 3 of the Heirs of Luis Maria Baca.

SIR: By an examination of the papers herewith inclosed relating to the 3d of the series of the Luis Maria Baca grants confirmed by the 6th Section of an act of Congress approved June 21, 1860, you will perceive that the location of the one fifth part of said grant as set forth by the claimants has been approved by the Surveyor General of New Mexico under whose jurisdiction the application properly came at the date of the approval.

See letter to Sur Gen'l New Mexico, Sept. 17, 1864. 91. 111.

The law of 1860 referred to provides that in lieu — the "Las Vegas" claim the heirs of Baca may select an equal quantity (496,446 96/100 acres) of vacant land not mineral" to be located by them in square bodies, not exceeding five in number and makes it the duty of the Surveyor General "to make survey and location of the lands so selected" when required by said heirs. The act of June 2d 1862 requires all such grants to be surveyed at the expense of the claimants. In order to avoid delay you are hereby

Order of Survey.

authorized whenever said claimants shall pay or secure to be paid to you a sum sufficient to liquidate all the expenses incident thereto, office work included, to contract with a competent Deputy Surveyor and have the claim numbered 3 of the series sur-
511 veyed as described in the inclosed application Transcripts of the field notes and plats certified in accordance with the requirements of law will be transmitted to this office and will constitute the muniments of title, the law not requiring the issue of Patents on these claims.

Description of the location amended. See Survey letter to Sur. Gen'l New Mexico, dated May 21, 1866.

In your instructions to the Deputy Surveyor you will direct as follows: At the beginning point which will be at the North east corner of the claim a stone must be firmly planted in the earth, leaving not less than eighteen inches projecting above the surface of the ground. Upon the west face of this stone the following inscription will be durably cut, to wit, (N. E. cor.)
(Baca)
(Ce No. 3) at the distance of each mile on the boundary line, from the beginning point a stone must be set or a post and mount erected, and said posts or stones numbered consecutively from the beginning point. At each of the other three corners stones must be securely planted and durably marked respectively as follows:

Marking.

(N. W.)	(S. W.)	(S. E.)
(cor.)	(cor.)	(cor.)

The affidavits of the Deputy attached to the field notes must set forth that the corners have been perpetuated and marked in accordance with the above directions.

Very Respectfully &c.
J. M. EDMUNDS, *Coms.*

Note.

For certificate of approval of application by Surveyor General of New Mexico see filed letter from 18th that office to this office dated June 17th 1863.

512 The foregoing statement and the certificate of Surveyor General Clark having been submitted to this Department and having undergone a careful examination, the location being approved by him to perfect title under the authority of the act approved June 21 1860 application for survey having been made, Instructions (copy herewith attached) have been given to Surveyor General Levi Bashford of Arizona in which Territory the lands located now are, to run

the lines indicated and forward complete survey and plat to be placed on file for future reference as required by law.

J. M. EDMUNDS, *Coms.*

513 *Order Substituting Defendant.*

Filed April 28, 1913.

* * * * * * *

It appearing to the Court that the defendant Walter L. Fisher has resigned the office of Secretary of the Interior, and that Franklin K. Lane has been regularly appointed thereto and has qualified as Secretary of the Interior, it is this 28th day of April 1913

Ordered, on the application of the plaintiffs and with the assent of the Attorneys for the defendants, that the said Franklin K. Lane as Secretary of the Interior be and he is hereby substituted as defendant herein, and that the cause be maintained against him as the successor in office of the defendant Walter L. Fisher.

By the Court,

JOB BARNARD,
Justice.

We consent,
HARTWELL P. HEATH,
Solr. for Pltf.
C. EDWARD WRIGHT,
Attorneys for Defts.

514 *Opinion of Court.*

Filed May 23, 1913.

In the Supreme Court of the District of Columbia.

No. 28,207 Equity.

CORNELIUS C. WATTS et al., Plaintiffs,
v.
FRANKLIN K. LANE, Secretary of the Interior, et al., Defendants.

On the filing of the bill herein, the defendants, the then Secretary of the Interior and the Commissioner of the General Land Office, filed a demurrer thereto, which was heard by the court, and a statement of the case and an opinion filed on April 27, 1909.

The consideration at that time convinced the court that the complainants, under the facts stated in the bill, and admitted by the demurrer, were entitled to some relief.

The theory of the bill is that the title to the tract of land described, passed from the United States to the heirs of Luis Maria Cabeza de Baca, under the treaties with Mexico, and statutes of the United States, and the action taken in pursuance thereof by the representatives of said Baca and the officers of the land department,

on April 9, 1864, as set out more specifically in the said opinion overruling the demurrer.

I will not repeat what was said in that opinion, as counsel
515 are familiar with it, but will consider the case made by the answer, testimony, and exhibits filed, the same being set down for final hearing on its merits, to see if the conclusion reached in deciding the demurrer will be changed by the case as now made.

The suit is brought for the purpose of enjoining the Secretary of the Interior, and the Commissioner of the General Land Office, from interfering with the complainants in their alleged ownership of the said tract of land, but assuming that the said lands are still public lands, and open to settlement, under the general law pertaining thereto; and particularly to enjoin said officers from further proceeding with the alleged homestead entry of one Henry Ohm. Also to require the defendants to place on file, for future reference, a survey of the said tract of land, known as the "Contzen" survey and plat, made under contract No. 136, dated June 17, 1905, so that the complainants may have the benefits of said survey in ascertaining the lines of their property.

The defendants claim that the complainants have not shown a clear title, if any, as successors or grantees of the heirs of said Baca. I think the court must hold, however, that the title which the complainants have shown, taking into consideration the old deeds given in evidence, and the recitals therein, and all the facts and circumstances, is presumptively the same title which the Baca heirs had; and no proof having been shown to the contrary by the defendants, the court will assume the title of complainants to be sufficient for the purposes of this suit.

516 The defendants in their answer, to distinguish the facts from those enumerated in the bill, and to avoid the effect thereof, aver that a previous location was made in 1862, and which is referred to as the "Bosque Redondo" selection.

It is perhaps sufficient to say in reference thereto, that this selection never ripened into a specific location, no locality having been designated according to any recognized lines of the public surveys, nor reported by the Surveyor-General as definitely acted upon.

The same was, with the consent of the General Land Office, withdrawn, on January 18, 1863, such withdrawal being acceded to by the Commissioner, on February 5, 1863; and this attempted location being thus avoided, and the three years in which the heirs of Baca had the right to make their selection, under the act of June 21, 1860, (12 Stat., 71,) not having expired, the selection of June 17, 1863, was made, and was approved by the Surveyor-General.

The defendants also aver in their answer, that an effort was made on the part of those representing the said heirs, to amend the location, or change the lines, by having the initial point commence three miles west by south from the building known as the "Hacienda de Santa Rita." This request was made by letter to the Commissioner of the General Land Office, on April 30, 1866. Such amended description seems to have been approved by the Commissioner, in a letter of May 21, 1866, on the theory that the tract of land was not

changed materially thereby, and from that time onward, the
517 representatives of the Baca heirs, and the officers of the land department, treated the matter as if a simple amendment had been made in the description, and frequently referred to the subject under this supposed amended selection, until on July 25, 1899, the Land Department decided that the attempted amendment of 1866 was without authority, and wholly void, as it was substantially a new location, and that the claimants were bound by the selection of June 17, 1863. In this decision the claimants seem to have acquiesced.

Thereafter, it is shown by the evidence, that the Surveyor-General of Arizona was directed to survey the tract as originally selected, and that in making the survey, it is claimed by the defendants that it was discovered that a portion of said tract was mineral land, and a portion was occupied or covered by conflicting grants, at the time the selection was made, and that the notes and plats of said survey made under contract with Philip Contzen, showing those facts, were filed in the office of the Surveyor-General, on November 23, 1906.

The defendants state in their answer, that the said Surveyor-General, while said survey was in progress, made examination of the character of the land, and took evidence of witnesses as to its known character prior to 1863; and reported to the department, recommending that the selection be rejected as an entirety, as not being subject to the provisions of the said act of June 21, 1860.

It is also stated in the answer, that on May 13, 1907, the
518 General Land Office rendered its decision, adverting to the fact that the survey in question had been made not for the private purposes of the claimants, but for the purpose of enabling the General Land Office properly to administer the public land laws; and the Commissioner ordered that the Surveyor-General should notify the said claimants that sixty days from notice would be allowed them to introduce evidence to disprove the prima facie showing as to the known character of the land on June 17, 1863, and in default, the said findings of the Surveyor-General would be accepted as correct, and the entire selection rejected.

An appeal was thereafter taken to the Secretary of the Interior, and on June 2, 1908, the then First Assistant Secretary, Hon. Franklin Pierce, rendered a decision, affirming the decision of the Commissioner.

A motion for review was filed, and on December 5, 1908, the said Assistant Secretary overruled the same.

It is also stated in the answer that there are a number of entries made by various persons wholly or partly within the exterior limits of the said Baca Float No. 3, in Arizona, such entries being made while the claimants and the government were considering the selection of 1866 as if it was a valid selection.

In paragraph 37 of the answer, the defendants say that the United States has never conceded, and does not now concede, that the title to the land involved has ever passed out of the United States to the heirs or assigns of Baca; and they aver that the United States has at all times, since June 17, 1863, been in possession of said land,
519 and that the Baca claimants, including the plaintiffs, have

never been in such possession, and have never attempted to take possession, or to exercise the rights or duties of ownership over the same, and that said claimants were attempting to secure a survey and passing of title to another and different tract of land as the situs of said Float No. 3, from 1866 until 1899.

The crux of the present controversy is the question, was the title devested from the United States, and vested in the heirs of Baca, or their assigns, on April 9, 1864?

If it was not so devested from the government, and vested in said heirs, then of course the defendants had the jurisdiction and the duty to consider the said land as public land, and to administer it as such; and all the proceedings that were had with reference to the change in the initial point suggested in 1866 would have been competent, provided the statute had authorized a change, or a new selection, after the expiration of the three years' limitation fixed by the statute of June 21, 1860.

But all that proceeding was evidently had under a mutual mistake, because the Land Department decided in 1899, that the said amended selection of 1866 was void, and the proceedings following the same relating thereto must also be considered void; thus leaving the selection of June 17, 1863, to stand as the only selection that might be considered as valid or possible under the said act.

If that selection was proper, and was approved by the gov-
520 ernment at the time stated, nothing remains but the marking of the boundaries, in order to segregate the same from the lands of the government, and allow the owners to take possession. The character of the land so selected was necessarily to be considered and decided at that time, and cannot now be inquired into, if the title passed to the said heirs, as claimed.

It seems exceedingly doubtful if the Surveyor-General in 1905, could be constituted a competent court to take testimony of the old citizens, and correctly ascertain what the character of the land in question was on June 17, 1863. That would be a difficult thing for a duly organized court to ascertain, from testimony taken in open court, in the presence of adverse parties, where cross-examinations could be had; but the Surveyor-General undertakes to ascertain that fact by ex parte affidavits, many of them based on hearsay, and certainly with little or no definite knowledge as to lines or boundaries of the tract as now surveyed. This testimony, if it could be lawfully taken at this late date, is exceedingly unsatisfactory, but if the title was already vested in the said heirs, the Surveyor-General's work in this respect was without force or effect.

The answer contains certain averments, that there were conflicting grants of an older date than the claim of the Baca heirs to this particular tract, or to portions of it, and that it was the duty of the government to preserve the rights of those claimants, and for that reason this particular tract was not subject to the selection of June
17, 1863; and also that the town of Tubac was then located
521 on a portion of this tract.

These alleged conflicting grants were known as Tumacacori, Calabazas, and San Jose de Sonoita.

As to the two first named grants, the Supreme Court, held in the case of Faxson v. United States, 171 U. S., 244, that they were void.

As to the grant known as the San Jose de Sonoita, it is averred that the Supreme Court, in the case of Ely's Administrator v. United States, 171 U. S., 220, held, that as to a portion thereof the grant was valid; and it is contended by the defendants that such conflicting grant prevented the said Baca heirs from choosing this particular tract. That the said San Jose de Sonoita grantees were not in possession of the premises at the time, but that having the right to present their claim under the Mexican grant, the government was obliged to protect that right under the act of July 22, 1854, (10 Stat., 308).

This contention of the defendants does not seem to the court to be sustained under the provisions of the said act of June 17, 1860. The only conditions asserted in that act were that the land to be selected should be vacant and non-mineral. An undisclosed claim, if invalid or void, could not defeat a selection otherwise lawful.

At the time the selection was made and approved by the Surveyor-General, the said grantees had not made known their claim under the alleged Mexican grants, and so far as the government knew, no such claims existed.

There may be a serious question to be tried out in some
522 other court, as to whether the San Jose de Sonoita grant, or that portion of it which was held to be valid by the Supreme Court, will have a prior right to the Baca heirs; but in my view of the case, the said grants would not defeat the selection made by the Baca heirs, if such approval was given to the selection by the government that title vested in said heirs, before such claims were discovered.

Suit cannot be maintained in this court for the purpose of trying the title to said tract of ground as between adverse claimants. That must be tried in the local courts; and if the facts disclosed by the record now are sufficient to show that the title passed from the United States, then it is clear that the United States is not a necessary party defendant herein.

It is also clear that any claimants who have settled on portions of the said tract, pending negotiations between the Baca heirs and the government, and who are not parties herein, or any claimants under Mexican grants that conflict with the claim of the Baca heirs, or the town of Tubac, if on this tract, not being parties herein, will not be bound by any judgment that this court may enter. If adverse claims are made to any portion of the said tract, they must be adjudicated in the courts of Arizona, if title passed from the United States, as contended by plaintiffs.

There is some contention in the case that surveys were not made of this grant when first ordered, because defendants claim that the claimants were required to deposit the necessary costs for the
523 survey, but failed to do so; and on the other hand, it is claimed by the plaintiffs, that they were not required under the law to make any deposit to pay for surveys; that being grantees under the act of June 21, 1860, of the United States, and being such grantees by reason of the relinquishment of the Mexican grant,

which was declared to be valid, to the tract including the town of Las Vegas, that it was the duty of the government to make the survey so as to segregate their land from the other public land held by the government.

The language of the said statute is,

"And it shall be the duty of the Surveyor-General of New Mexico to make survey and location of the land so selected by the said heirs of Baca when thereunto required by them."

Nothing is said about imposing the costs of survey upon them.

Under the terms of the act of Congress of June 2, 1862, (12 Stat., 410,) grants of land derived from any foreign country or government were to be surveyed, under the direction of the proper officer of the government of the United States, upon the application of the parties claiming or owning the same, and at their expense.

Counsel for the plaintiffs contend that these provisions of law do not apply to this grant, which is from the United States under the act of June 21, 1860.

I am disposed to hold that their contention is correct, and that the survey, which is provided for by said act of June 21,
524 1860, is a survey to be made by the government at its own expense.

The said act of June 2, 1862, also provides that nothing in the law requiring the executive officers to survey land claimed or granted under any laws of the United States, shall be construed either to authorize such officers to pass upon the validity of the titles granted, or to give any greater effect to the surveys than to make them prima facie evidence of the true location of the land claimed or granted; nor shall any such grant be deemed incomplete for the want of a survey or patent, when the land granted may be ascertained without a survey or patent.

Under this statute, and under numerous decisions, a survey or a patent was not absolutely necessary in order to pass title from the government, for it seems clear that the description given in the location of this tract would enable a surveyor to ascertain the same without great difficulty; and the fact that the "Contzen" survey was made, and filed with the Surveyor-General, demonstrates the correctness of this view.

The purpose of such survey is to separate or segregate the land, the title to which passes to the grantees, from the public domain, so as to enable the grantees to take possession and maintain their property lines, and the officers of the Land Department to know what are public lands.

Counsel for the defendants contend that the officers of the Land Department have decided that this tract is public land, be-
525 longing to the United States; and that, therefore, this court is without jurisdiction in this case, because the United States cannot be sued, and is not a party herein.

The facts do not justify this contention, for the reason that it is said in the documents put in evidence, that the matter is still under consideration by the officers of the Land Department; that they are uncertain whether it is public land, or whether it is private land;

and they gave notice to the claimants, that unless they appeared before the Surveyor-General, and showed that the said land was at the time of the selection vacant and non-mineral, that they would adopt the recommendation of the Surveyor-General, and reject the whole selection after the expiration of sixty days. (Answer, page-50-51.)

On page 52 of the answer, they further state that the title to the said tract still remains in the United States, and within the exclusive jurisdiction of the Department of the Interior; and they also state, that if plaintiffs shall make application before the Surveyor-General for hearing, and any part of the tract is found to be vacant on June 17, 1863, and not known to have been mineral, they will take proper proceedings to evidence the final passing of title to the Baca heirs, or their grantees.

The court has examined, at great length, the averments of the defendants in their answer, and the exhibits filed in this case, and has also considered the many authorities cited by counsel on both sides, in their elaborate briefs; and is unable to reach any different
526 conclusion as to the passing of the title from the government, by reason of the case as now made, than was reached in considering the demurrer to the bill.

Some facts alleged in the bill, not deemed material to the issue, have been changed by the case as now made. For instance, it is now said in argument, that the surveyor who undertook to execute the first survey was not killed by the Indians, but that delay in making the survey was occasioned by the ineffectual effort to change the location by the application made in 1866.

As before stated, that so called change of location was beyond the power of the heirs of Baca to make, and beyond the power of the Land Department to accept; and the location being wholly void, and all the proceedings under it void, the delay occasioned thereby, being the result of a mutual mistake, ought not to militate against the plaintiffs herein.

The order given by the Commissioner to the Surveyor-General, on April 9, 1864, says that the location has been approved by the Surveyor-General of Mexico, and that application for survey has been made; and contains nothing to show that he expected the Surveyor-General to make any further report as to the land being vacant and non-mineral, but directs him to run the lines indicated, and forward a complete survey and plat, to be placed on file for future reference, as required by law.

The general instructions given to the Surveyor-General of New Mexico, on July 26, 1860, by the Commissioner of the Gen-
527 eral Land Office, authorized the selection of the Baca heirs to be made outside of existing surveys, and gave directions as to how the surveys were to be made when such selection was made, and then required a statement from the Surveyor-General, and Registrar and Receiver, that the land was vacant and non-mineral.

There is some contention as to whether the statements made by the Registrar and Receiver, on the 25th day of March, 1864, were in the hands of the Commissioner of the Land Office at the time

he gave the order on April 9, 1864, for the survey of this tract. If not then in the hands of the Commissioner, however, they were evidently on the way to him, and were shortly thereafter received at his office; and there does not appear to be any further wish or expectation on the part of the then Commissioner to receive more definite or positive proof as to the character of the land embraced in the selection.

The court will take judicial notice of the condition of the country at that time, and consider as well the facts from the record in this case. It was in the midst of the Civil War; the territory where this land was selected was inhabited by hostile Indians or subject to raids by them; the selection was made in unsurveyed lands; the grantees were receiving value, or supposed value, for the grants that they had relinquished; and it may well be that the Commissioner made up his mind, before the receipt of the said certificates, that no more definite information could be obtained, than
528 that contained in the application itself, signed by John S. Watts, attorney for the heirs, and the statement of the Surveyor-General. That definite information could not be had without the survey, and that, as respects this particular portion or tract, the Commissioner would waive the requirements of the instructions before given by him as to the manner of proof for ascertaining the character of the land.

Mr. Watts says, in the document making the selection, "Said tract of land is entirely vacant, unclaimed by anyone, and is not mineral to my knowledge."

The Surveyor-General says,

"As this location is far beyond any of the public surveys, I have not deemed it necessary to procure any certificate from the Registrar and Receiver of the Land Office, as from the nature of the case they cannot officially know anything concerning it."

He says, in the second statement,

"As I am personally unacquainted with that region of the country, I cannot certify that the land is vacant and not mineral, or otherwise."

Whether the certificates of the Registrar and Receiver of March 25, 1864, were before him, or not, the Commissioner, as the final arbiter between the claimants and the United States, had the right to approve the selection, and direct the survey, for the purposes stated, and his absolute action in that respect, in my judg-
529 ment, forecloses the Land Office now from questioning the propriety of such act.

The title to the tract selected, under the authority of the Supreme Court, in the case of Shaw v. Kellogg, 170 U. S., 312, passed to the heirs of Baca when that approval was made, on April 9, 1864.

While the two cases differ in some respects, the substantial facts necessary for the title to pass seem to be present in this case, as in the case of Shaw v. Kellogg. The fact that mineral might be discovered in the land thereafter could not defeat the selection when once approved.

Under all the circumstances shown by the testimony and exhibits,

and the authorities cited by counsel. I must hold that the title passed on April 9, 1864, to the heirs of Baca; and if I might in that conclusion, then, under the authority of the Supreme Court, in Noble v. Union River Logging Railroad Co., 147 U. S., 165, and other authorities cited, I think this court has authority to enjoin the defendants from treating the said tract of land as being any longer public land. I cannot, however, think that the map or survey made under the "Contzen" contract can be changed in any respect by the order of this court. It is the plain duty of the defendants to have the same filed in the Land Office, for the benefit not only of the plaintiffs, but for their own benefit, and that of the public in the orderly administration of the public land laws.

I think, therefore, the injunction prayed for, must be granted, with the exception that the "Contzen" survey and plat will
530 be filed in its present condition.

In said case of Shaw v. Kellogg, the conditional approval provided the land should be vacant and not mineral, did not prevent title passing, and that would apply to the notations on the said plat and survey, perhaps; for notwithstanding such, they would be unavailing to prevent the title vesting as above stated. They could not be effectual to authorize the Land Department to reject the selection as an entirety, as its officers have intimated they would do.

I will sign a decree in accordance with these views, without prolonging this opinion by the discussion of other points presented in the briefs of counsel.

JOB BARNARD, *Justice.*

Decree.

Filed June 3, 1913.

* * * * * * *

This cause came on to be heard at this term and was argued by Counsel; and thereupon upon consideration thereof it is by the Court, this 3d day of June 1913.

Ordered, adjudged and Decreed that the title to the land selected and located by the heirs of Luis Maria Cabeza de Baca on June 17, 1863, under the grant made to them by the Act of Congress of June 21, 1860, and known as Baca Float No. 3 passed out of the
531 United States and vested in said heirs on April 9, 1864; and it is further

Ordered, adjudged and decreed that thereafter the Land Department of the United States ceased to have jurisdiction over said land except for the purpose of surveying the outboundaries thereof in order segregate the same from the Public Lands of the United States; and it is further

Ordered, adjudged and decreed that the plaintiffs herein, or some of them, have shown sufficient title in themselves to said land to enable them to maintain this suit; and it is further

Ordered, adjudged and decreed that the defendants, Franklin K. Lane, Secretary of the Interior, and Frederick Dennett, Commissioner of the General Land Office, and each of them, and their successors in

office, and all persons claiming to act under the authority or control of either of them, be and they hereby are required forthwith to place on file, as muniment of the title which passed to the heirs of said Baca, as aforesaid, and for future reference, as required by law, the field notes and plat of survey made by Philip Contzen under contract No. 136, dated June 17, 1905, for the purpose of defining the outboundaries of said land and segregating the same from the Public Lands of the United States; and it is further

Ordered, adjudged and decreed that the defendants, Franklin K. Lane, Secretary of the Interior, and Frederick Dennett, Commissioner of the General Land Office, and each of them, and their successors in office, and all persons claiming to act under the
532 authority, direction or control of either of them, be and they hereby are enjoined from proceeding in any manner in the matter of the alleged homestead entry of Henry Ohm, Tucson No. 3024, February 2, 1899, or in the matter of any of the other alleged entries set out in Exhibit A to the answer herein, or in any other matter affecting said land except to file the survey as herein directed.

JOB BARNARD, *Justice.*

Consented to as to form.
New York, June 2, 1913.
HERBERT NOBLE,
JAMES W. VROOM,
Att'y pro se.
G. H. BREVILLIER,
Counsel for John Watts.

Now comes the defendants by their attorneys in open court and note an appeal in this cause to the Court of Appeals of the District of Columbia; and it is hereby ordered that the execution of said decree hereinbefore issued be stayed pending said appeal.

June 3, 1913.

JOB BARNARD, *Justice.*

533 *Assignment of Errors.*

Filed June 18, 1913.

* * * * * * *

The defendants and appellants hereby assign the following errors in the decision and decree of the court in the above-entitled cause:

I. The court erred in assuming jurisdiction to determine title to land in another jurisdiction.

2. The court erred in not recognizing and holding that the suit involves the determination of the title to land claimed by the United States.

3. The court erred in not recognizing and holding that the suit is essentially one against the United States and that the United States is a necessary but absent party.

4. The court erred in assuming jurisdiction to determine the question of title presented in the face of the fact that the United

States is a necessary party but has not been and could not be made a party because it has not in this behalf consented to be sued.

5. The court erred in failing to recognize and hold that the purpose and prayers of the bill are to interfere with and control the action of the officers of the land department in the exercise of their proper jurisdiction and discretion in the determination and disposition of questions and matters affecting the so-called Baca Float No. 3 coming before them for decision.

6. The court erred in assuming jurisdiction to interfere
534 with and control the discretion and judgment of the officers of the land department in the decision and disposition of questions and matters affecting the so-called Baca Float No. 3 properly before them for determination and action.

7. The court erred in not recognizing and holding that the question as to whether or not the legal title to the land embraced in the so-called Baca Float No. 3 has passed out of the United States was properly before the land department and involved the exercise of judgment and discretion by the officers of the land department in the determination thereof.

8. The court erred in not recognizing and holding that the determination of the question as to whether or not the legal title to the land embraced in the so-called Baca Float No. 3 had passed out of the United States involved the exercise of judgment and discretion by the officers of the land department in construing the act of June 21, 1860, and passing upon the function and effect of the various proceedings had in respect of said Baca Float No. 3.

9. The court erred in not recognizing and holding that the ruling of the officers of the land department that under the act of June 21, 1860, the final act by which the legal title passes from the United States is the acceptance by the Department and the filing of approved plat and field notes of a survey whereby the surveyor-general makes location, as vacant and non-mineral, of land selected by the heirs of Baca, involved the exercise of judgment and discretion
535 and is not subject to review in direct proceedings of this character.

10. The court erred in not recognizing and holding that in the performance of their proper administrative functions and duties, the officers of the land department were called on to exercise judgment and discretion in determining whether or not the area embraced in the so-called Baca Float No. 3 is still part of the public domain and that their decision that it is and their administration of it as such can not be interfered with or controlled by the court in direct proceedings of this character.

11. The court erred in not recognizing and holding that in the performance of their proper administrative functions and duties the officers of the land department were called upon by the present claimants to determine whether or not the action taken by the Commissioner of the General Land Office on April 9, 1864, passed out of the United States the legal title to the so-called Baca Float No. 3 and that their decision that it did not involve the exercise of judg-

ment and discretion and can not be interfered with by the court in direct proceedings of this nature.

12. The court erred in not recognizing and holding that in the performance of their proper administrative functions the officers of the land department were called upon to determine whether or not the area embraced in the Sonoita and Calabazas and Tumacacori claims was reserved from selection by the Baca heirs and that their decision that it was so reserved involved the exercise of judg-
536 ment and discretion and can not be interfered with by the court in direct proceedings of this nature.

13. The court erred in not recognizing and holding that in the performance of their proper administrative functions the officers of the land department were called upon to determine whether or not the area embraced in Tubac township was occupied and not vacant and therefore reserved from selection by the heirs of Baca, and that their decision that it was so reserved involved the exercise of judgment and discretion, and can not be reviewed or interfered with by the court in direct proceedings of this nature.

14. The court erred in determining that legal title to the land involved passed out of the United States to the heirs of Baca on April 9, 1864.

15. The court erred in its construction of the act of Congress, approved June 21, 1860, in that it held that under said act legal title could, and did, pass prior to survey and filing of approved plat and field notes thereof.

16. The court erred in not holding that under the act of June 21, 1860, it was necessary that the surveyor-general in the first instance, should determine the character of the land, as was held by the Supreme Court in Shaw v. Kellogg (170 U. S., 312).

17. The court erred in holding that the Commissioner of the General Land Office had authority, in the absence of a determination of the character of the land by the proper surveyor-general, himself to determine the character of the land, approve the selection,
537 and pass title from the United States.

18. The court erred in holding that the surveyor-general of New Mexico was the proper officer to act upon the selection in question.

19. The court erred in not holding that at the time the selection was tendered and until after April 9, 1864, the surveyor-general of Arizona was the proper officer to act upon the said selection and determine in the first instance the character of the land embraced therein.

20. The court erred in holding that the Commissioner of the General Land Office, by his letter directing survey, dated April 9, 1864, determined the character of the land, approved the location, and passed the title.

21. The court erred in holding that plaintiffs have shown title, as successors in interest to the heirs of Baca, sufficient to enable them, or any of them, to maintain this suit, in this, that he failed to find and to hold that there was no proof that the parties recited in the deed from the so-called heirs of Baca to John S. Watts (Plaintiffs'

Exhibit A. H. No. 1) were in fact the heirs of Baca to whom the right to select land in lieu of the Las Vegas claim was granted; and in this that he held, in effect, that said deed proved itself in the absence of any evidence that the grantors were the heirs of Baca and in the absence of possession and claim under said deed.

22. The court erred in holding that plaintiffs have shown title, as successors in interest to the heirs of Baca, sufficient to enable
538 them, or any of them, to maintain this suit.

23. The court erred in holding that the Tumacacori, Calabazas, and San Jose de Sonoita grants, Mexican or Spanish grants, so far as they conflict with Baca Float selection No. 3, did not pro tanto defeat said selection.

24. The court erred in not holding that under the act of July 22, 1854, no affirmative action on the part of those claiming under alleged Spanish or Mexican grants was required in order to place the lands covered by said claims in reservation from other appropriation as a part of the public domain.

25. The court erred in enjoining the defendants from further action upon the Ohm and other homestead and mineral entries pursuant to the ruling of the officers of the land department that the land embraced therein, being within the Calabezas and Tumacacori claims, was not vacant land at the date of application for the so-called Baca Float No. 3 and not appropriated thereby, and is now public land subject to entry.

26. The court erred in enjoining the defendants to file the plat and field notes of the Contzen survey in the face of the fact that the officers of the land department in the exercise of their proper judgment and discretion have decided and now contend that in view of the report of the surveyor-general that the land in question at the time of application for the so-called Baca Float No. 3 was not vacant and non-mineral within the meaning of the act of June 21, 1860, such plat and field notes should not be approved or filed.

539 27. The court erred in not dismissing the bill.

CHARLES W. COBB,
Ass't Att'y General;
C. EDWARD WRIGHT,
Ass't Attorney,
Attorneys for Defendants.

Designation of Record.

Filed June 18, 1913.

* * * * * * *

The Clerk of the Court in preparing the transcript of the record on the appeal of the defendants in the above-entitled cause will include therein the following:

1. Plaintiffs' bill.
2. Demurrer.
3. Opinion of the court overruling demurrer.
4. Order overruling demurrer.

5. Defendants' answer.

6. Replication.

7. Plaintiffs' testimony, including exhibits, omitting the full text of certain deeds where they appear a second time, as on pp. 86 et seq. (Exhibit A. H. No. 13), on pp. 102 et seq. (Exhibit A. H. No. 14), and on pp. 127 et seq. (Exhibit A. H. No. 17).

8. The following conveyances filed by stipulation April 28,
540 1913; and the stipulation itself.

(*a*) Deed from heirs of John S. Watts to John Watts, dated October 26, 1899.

(*b*) Deed from heirs of John S. Watts to James W. Vroom, dated October 25, 1899.

(*c*) Deed from Alex. F. Mathews and S. A. M. Syme to Arizona Copper Estate, dated August 2, 1899.

(*d*) Mortgage from Arizona Copper Estate to said Mathews and Syme, dated August 3, 1899.

9. Certified copy of letter from Second Assistant Postmaster General to C. A. Keigwin, dated January 11, 1913, exemplified under seal of Post-Office Department May 10, 1913.

10. The stipulation filed January 29, 1913, admitting defendants' exhibits.

11. Defendants' exhibits Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 21, 22, 23, 24, 25, 28, 29, 30, 31, 32, 33, 36, 37, 38, 41, 42, 43, 45, 47, 48, 49, the plat of survey attached to defendant's exhibit- No. 50, 51, 52, 53, 56, including plaintiffs' objections attached to each exhibit.

12. The clerk will include the plaintiffs' general objections to the defendants' exhibits and the objections attached to each of the following numbered defendants' exhibits, but will omit the text of said exhibits because the same already appears in the record, as follows:

No. 1, on p. 12 of the printed answer.
No. 2, on pp. 13-15 of the printed answer.
No. 3, on pp. 15-16 of the printed answer.
No. 4, on pp. 16-17 of the printed answer.
541 No. 14, on pp. 20-22 of the printed answer.
No. 15, on pp. 22-23 of the printed answer.
No. 16, on pp. 23-24 of the printed answer.
No. 17, on pp. 24-25 of the printed answer.
No. 18, on pp. 26-27 of the printed answer.
No. 19, on pp. 27-29 of the printed answer.
No. 20, on pp. 29-31 of the printed answer.
No. 26, on pp. 33-34 of the printed answer.
No. 27, on pp. 35-39 of the printed answer.
No. 50, the text of which appears as Exhibit B in the printed answer, on pp. 61 et seq. thereof.
No. 54, the text of which appears as Exhibit A in the printed answer on pp. 55-60 thereof.
No. 55, the text of which appears as Exhibit D in the printed answer, on pp. 110-112 thereof.

13. Opinion of the court sustaining the bill.

14. The decree.

15. Notation of appeal and order staying decree.
16. Assignment of errors.
17. This designation.

CHARLES W. COBB,
Asst. Att'y General;
C. EDWARD WRIGHT,
Asst. Attorney,
Attorneys for Defendants and Appellants.

(Endorsed:) Service acknowledged June 18, 1913, J. W. Bailey, per C. W. Scully, Att'y for Pl'ff.

542 *Supplemental Designation of Record.*

Filed July 11, 1913.

* * * * * * *

In making up the transcript of the record on the appeal of the defendants in the above entitled cause, the clerk will omit the matters included in the 7th and 8th items of the Designation heretofore filed; the parties hereto having filed in place thereof the agreed "Statement of plaintiffs' evidence" allowed by the court, June 11, 1913.

The defendants' evidence, being documentary entirely, the clerk will insert the same, as designated in items 11 and 12 of the Designation hereinbefore filed as aforesaid, in extenso, at the instance of the appellants.

C. EDW. WRIGHT,
Attorney for Defendants.

Memoranda.

July 11, 1913.—Statement of Plaintiffs' evidence approved and filed.

July 15, 1913.—Time in which to file transcript of record in Court of Appeals extended to, and including, August 11th, 1913.

543 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 542, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 28207 in Equity, wherein Cornelius C. Watts et al. are Plaintiffs and Franklin K. Lane, Secretary of the Interior et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 9th day of August, 1913.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk*,
By F. E. CUNNINGHAM,
Assistant Clerk.

544 In the Supreme Court of the District of Columbia.

In Equity. No. 28207.

C. C. WATTS et al.
vs.
FRANKLIN K. LANE, Secretary of the Interior, et al.

Statement of Plaintiffs' Evidence.

On behalf of plaintiffs there was offered in evidence a deed, marked Exhibit A. H. No. 1, in words and figures as follows (the nature of the case requiring that it should be set forth in extenso):

Know all men by these presents: That we, Luis Baca, Prudenci Baca, Jesus Baca and Domingo, sons of Luis Maria Baca, residents of Pena Blanco New Mexico: That we, Josefa Baca y Lucero, wife of Luis de lao and Attagracia Baca wife of Francisco Martine, daughters of Luis Maria Baca, residents of Pena Blanco, New Mexico, in our own proper persons, and we, either in our own persons or by our attorney in fact Tomas Baca, to wit, Jesus Baca, Tomas Baca, Encarnasion Baca, wife of Manuel Viscara, Josefa Baca wife of Demetrio De Lao, Jose Baca, Tomas Baca 2nd, Trinidad Baca, wife of Fernando Delgado Attagracia Baca, wife of Patricio Silva, children of Juan Antonio Baca, deceased, son of Luis Maria Baca; we Francisco Silva, Isabel Silva wife of Viceato Amijo, Jesus Maria Silva, Benito Silva, Valentine Silva and Manuel Silva, children of Cecaria Baca, deceased, who was a daughter of Juan Antonio Baca, deceased; we, Isabel Baca wife of Jose Direteo Senor Daria Baca, Santiago Baca Ularia Baca, wife of Luis Maria Ortez, and Adelide Baca, children of Demingo Baca, deceased, son of Juan Antonio Baca; we, Antonio Baca, Felipa Baca, wife of Jose Baca, Jesus Maria Baca, Fernando Baca, Josefa Baca, wife of Jesus Baca, Polenia Baca, wife of Pelleo Archilegue, and Francisco Baca, children of Jose Baca, deceased, son of Luis Maria Baca; we, Juenro Baca, Diego Baca, Guadalupe Baca, wife of Jesus Maria Leiba, Remaldo Baca, Martina Baca, and Paulina Baca, children of Miguel Baca, deceased, son of Luis Maria Baca; we, Luis Maria Baca, Alegandio Baca, Juan de Deas Baca, and Martine Baca, children of Matio Baca, deceased, son of Luis Maria Baca, deceased; we, Antonio Trujido, Maria Josefa Trujido, wife of Cesario Romerez, Andres Trujido, Juana Trujido, children of Gaudalupe Baca, daughter of

Luis Maria Baca and wife of Santiago Trujido; and we, Josefa Lopek, wife of Nicholas Armijo and daughter of Teleceand Trujido, deceased, daughter of Gaudalupe Baca, deceased; Marto Lopez, son of said Teleceand Trujido; Attagracia Lopez, wife of Francisco Romerez and daughter of said Teleceand Trujido; Jesus Maria Trujido, son of Gaudalupe Trujido, deceased; who was a daughter of Gaudalupe Baca, deceased; we, Josefa Lalas, wife of Jose Martine and daughter of Rosa Baca, deceased, daughter of Luis Maria Baca, Dolores Baca, daughter of said Rosa Baca, deceased; we,
545 Espendion Baca and Refugia Baca, children of Francisco Baca, deceased, son of said Rosa Baca; we, Josefa Baca y Sanchez, daughters of Luis Maria Baca and wife of Juan Luis Mentoya; we, Antonio Garcia, Francisco Garcia, Maria Enes Garcia, Juana Maria Garcia and Maria de Las Angelas Garcia, children of Juana Baca, deceased, daughter of Luis Maria Baca and wife of Jose Garcia; we, Josefa Baca y Lucero, daughter of Luis Maria Baca and wife of Luis de Lao; we, Attagracia Baca, daughter of Luis Baca and wife of Francisco Martine. I Tomas Catega de Baca, owner of the interest and claim of Manuel Baca, son of Louis Maria Baca, to his intent, as heir of Louis Maria Baca, as appears by Deed of Conveyance executed the 17th day of June, 1861, and duly recorded in the records Book of the Register of Deeds for Santa Ana County, Letter D, page- 6 and 7; and I Tomas Catega de Baca, owner of the interest of Ignacio Baca, only son and heir of Ramon Baca, deceased, son of Luis Maria Baca, as appears by Deed of said Ignacio Baca and Maria Gaudalupe Hurtado, to said Tomas Catega de Baca, executed on the 1st day of June, 1861, and *only* recorded in the Record Book D of Deeds for Santa Ana County, page- 5 and 6; I Jesus Maria Catega de Baca, owner by purchase of the interest of Jesus Baca by Lucero 1st son of Luis Maria Baca, as appears by Deed of said Jesus Baca y Lucero 1st and Maria Rafeala Amijo, his wife, executed the 20th day of August, 1861, and recorded in the record Book Letter D, page- 12 and 13 of the Register of Deeds for Santa Ana County; and I Francisco Baca, owner by purchase of the interest of Domingo Baca, son of Luis Maria Baca, for and in consideration of the services of John S. Watt*a* for many years in and about the business of said heirs of Louis Maria Baca, as the Attorney of said heirs, and for the further consideration of Three Thousand Dollars, paid by the said John S. Watts to Tomas Catega de Baca, our Attorney in fact, have bargained, sold, and conveyed and by these presents bargain, sell, and convey to the said John S. Watts, of Santa Fe, New Mexico, and to his heirs and assigns forever, all our right, title, interest, and claim in and to the following lands, located upon by us, as heirs of Luis Maria Baca, under the 6th Section of an Act of Congress, approved June 21st, 1860, to wit, Location No. 2, situate on the Canadian or Red River in the Territory of New Mexico, and described as follows, to wit: Beginning at the corner of sections 21, 22, 27 & 28, in Township 13, North of the Base line and Range 29 East of New Mexico principal Meridian; running from said initial point North six miles eighteen chains and twenty-two links; thence East twelve miles thirty-six chains and

forty-four links; thence South twelve miles, thirty-six chains and forty-four links; thence West, twelve miles, thirty-six chains, and forty-four links; thence North, six miles, eighteen chains, and twenty-two links to the place of beginning, containing ninety-nine thousand two hundred and eighty-nine acres, and thirty-nine hundredths of an acres, more or less. Also location No. 3, situate in the Territory of Arizona, formerly in Dona Ana County, New Mexico, and described as follows, to wit: Commencing at a point one mile and a half from the base of the Salero Mountain, in a direction North forty-five degrees East of the highest point of said Mountain; running thence from said beginning point West
546 twelve miles thirty-six chains and forty-four links; thence South twelve miles thirty-six chains and forty-four links; thence East twelve miles, thirty-six chains and forty-four links; thence North twelve miles, thirty-six chains, and forty-four links, to the place of beginning containing ninety-nine thousand two hundred and eighty-nine acres, and thirty-nine hundredths of an acre, more or less. Also Location No. 4, situate in Costilla County, Colorado Territory, formerly in Tuos County, New Mexico, known and described as follows: Beginning at a point on the Eastern edge of the San Luis Valley, where the thirty-eighth degree of latitude crosses the dividing line of the plain and mountain; thence East along said parallel of latitude four and one-half miles; thence South at a right-angle to said parallel of latitude twelve and one-half miles; thence West at a right-angle twelve and one-half miles; thence North at a right-angle twelve and one-half miles to the aforesaid parallel of latitude; thence East with said parallel of latitude eight miles to the place of beginning, containing ninety-nine thousand two hundred and eighty-nine acres and thirty-nine hundredths of an acre, more or less.

To have and to hold the lands aforesaid, with all the appurtenances and privileges to the same belonging, to the said John S. Watts and his heirs, forever, in fee simple; and the said heirs of Luis Maria Baca, in person, and by their Attorney in fact, Tomas Catega de Baca, covenant with the said John S. Watts and his heirs, for themselves and their heirs, as follows, to wit:

1st. That they are seized in fee of the lands aforesaid and have good right and title to the same.

2nd. That said lands are free from encumbrance, and that they have full power to sell and convey the same.

3rd. That the said John S. Watts and his heirs and assigns shall quietly enjoy said lands forever free from all claims and demands of the said heirs of Luis Maria Baca, their heirs, administrators and executors.

4th. That we will defend and protect the title aforesaid against all claims or claims of title arising from or under us as heirs of said Louis Maria Baca, or under our heirs, executors or administrators.

5th. That the said John S. Watts and his heirs and assigns shall forever enjoy the lands aforesaid in as full and ample a manner as the heirs of Louis Maria Baca held and enjoyed the lands just before the execution of this conveyance.

In Witness Whereof we have hereunto set our hands and seals this 1st day of May 1864.

(Signed) DIEGO BACA [SELLO.]
LUIS BACA [SELLO.]
DOMINGO BACA [SELLO.]
JESUS MA. BACA [SELLO.]

Purchaser of the Interest of Jesus Baca y Lucero 2nd.

FELIPE BACA, [SELLO.]
Lui de la o E. O. ESPOSA JOSEFA BACA. [SELLO.]
JOSEFA BACA [SELLO.]
MA. ATTAGRACIA BACA [SELLO.]
PRUDENCIA BACA [SELLO.]
THOMAS C. DE BACA, [SELLO.]

Attorney in Fact for the Heirs of Juan Antonio Baca.

TOMAS C. DE BACA, [SELLO.]

Attorney in Fact for the Heirs of Jose Baca.

547 TOMAN C. DE BACA, [SELLO.]

Purchaser of the Interest of the Heirs of Ramon Baca.

TOMAN C. DE BACA, [SELLO.]

Attorney in Fact for the Heirs of Matio Baca.

TOMAS C. DE BACA, [SELLO.]

Attorney in Fact for the Heirs of Jesus Baca y Lucero 1st.

TOMAS C. DE BACA, [SELLO.]

Purchaser of the Interest of Manuel Baca.

TOMAS C. DE BACA, [SELLO.]

Attorney in Fact for the Heirs of Gaudalupe Baca.

TOMAS C. DE BACA, [SELLO.]

Attorney in Fact for the Heirs of Rosa Baca.

TOMAS C. DE BACA, [SELLO.]

Attorney in Fact for the Heirs of Josefa Baca y Sancho.

TOMAS C. DE BACA, [SELLO.]

Attorney in Fact for the Heirs of Juana Paulina Baca.

JESUS MA. BACA, [SELLO.]

Purchaser of the Interest of Jesus Baca y Lucero 2nd.

FRANCO. MARTINE ESPOSO DE
MA. ATTAGRACIA Y BACA. [SELLO.]

Executed and signed in the presence of—
BERNABE BACA AND
ATTANACIO SANCHEZ.

United States Int. Rev. Stamp, Five Dollars, Cancelled.

TERRITORY OF NEW MEXICO,
County of Santa Ana:

Personally presented themselves before me, Agassito Tafoya, one of the Justices of the Peace in and for the said County and Territory of N. M., the children and heirs of the deceased Luis Maria C. de Baca, whose names are found subscribed in the foregoing document, who appear as parties, who sign and execute this instrument, and

known to me as the children and heirs of the said Luis Ma. C. de Baca, and that they acknowledge to have executed and signed with their free will the foregoing document for the ends, and considerations expressed in it. Maria Attagracia Baca and Josefa Baca declare, in an examination apart from their husbands, *declare* to have signed as their free act, without compulsion of undue influence on the part of the husbands. And for their truthfulness I, the said Justice, sign with my own hand and in the presence of two witnesses in the pena Blanca to-day 2nd of May of the year of our Lord 1864.

(Signed) AGASSITO TAFOYA,
Justice of the Peace.

THE UNITED STATES OF AMERICA,
Territory of New Mexico:

I, Samuel Ellison, Clerk of the Supreme Court of said Territory, do hereby certify that Agassito Tafoya, before whom the foregoing acknowledgment was made and whose genuine signature is thereto attached, was at the time thereof a Justice of the Peace in and for the County of Santa Ana, Territory aforesaid, duly qualified to act as such, and that his official acts are entitled to full faith and credit.

In testimony whereof, I have hereunto set my hand and the seal of said Court, at Santa Fe, this 5th day of May, A. D. 1864.

[SEAL.] (Signed) SAM'L ELLISON,
Clerk Supreme Court, N. Mex.

548 TERRITORY OF NEW MEXICO,
County of Santa Fe:

I, the undersigned Notary Public, of the Court of Pruebas in and for the County of Santa Fe, in said Territory, certify that the foregoing document was recorded in the office of the said Court in order to be registered, on the 14th day of May, A. D. 1864, about 4 o'clock in the afternoon; and on the same day, month and year, it was registered by me in the Book Letter C on the pages marked in said Book 551, 552, 553, 554 and 555, said Book being kept in said office for like objects.

In testimony of which I have put my hand and the seal of the Court of the said County in Santa Fe of New Mexico to-day the 14th day of May, A. D. 1864.

(Signed) ANTONIO OZTIZ Y SALASED,
Notary Public of the Court of Pruebas.

United States Int. Revenue Samp, Ten cents.

Filed Oct. 21st at 11 o'clock A. M. and recorded in Vol. 1st, pages 314, *314*, 315, 316, 317 and 318. Costilla County Record C. F.

(Signed) C. D. HENDREN, *Recorded.*

TERRITORY OF NEW MEXICO,
County of San Miguel:

I, the undersigned, a Notary Public of the Court of Pruebas of the County of San Miguel, certify for this that the foregoing document was presented before me, in order to be registered for Mr. John S. Watts, on the 24th day of August of 1866, in the 3rd Book of Documents, pages 51, 52, 53, 54, 55, 56, 57 and 58, belonging to the office of said county.

In Testimony of which I put my name and the Common Seal of the Court of Pruebas, Vegas, N. M., August 24th, A. D. 1866.

(Signed) JOSE L. RIVERE,
Notary Public.

United States Int. Revenue Stamp, Two cents.

UNITED STATES OF AMERICA,
State of New York, City and County of New York, ss:

I, Charles Nettleton, a Notary Public in and for the City, County and State of New York, duly commissioned and sworn, and dwelling in said city of New York, do hereby certify that I have this day carefully examined and compared the foregoing Copy of a certain Instrument, and the Certificate of acknowledgment thereof, and the several other Certificates endorsed at the foot of the same, with the original Instrument, and Certificates of which the foregoing purport to be copies, and, after such examination and comparison I hereby further certify that the foregoing is a true and correct copy of the said original Instrument, and of the whole thereof, and also of each and every of the original certificates endorsed at the foot of said original Instrument, and of each and every part of such Certificates.

549 In Testimony whereof I have hereunto set my hand and affixed my Notarial Seal this 13th day of January, A. D. 1870.

[NOTARIAL SEAL.] CHARLES NETTLETON,
Notary Public in and for the City and County of New York, State of New York.

Vu au Consulat general de France aux Etats Unis pour legalization de la signature ci dessus de Mr. Charles Nettleton, Notaire Public pour et dans la ville et l'Etat de New York.

New York le 16 Janvier, 1870.

Le Consul, gerant Le Consulat General.

[OFFICIAL SEAL.] A. L. DE LA FOREST.

No. 61.
Art. 63.
Solvet: $2.86.

To which instrument the defendants objected on the grounds—that it is incompetent, irrelvant and immaterial; that there is no

foundation laid for its introduction; and, on the further ground, that it does not purport to be an original document, and that there is no sufficient certificate of any officer having custody of the original of which it is a copy; and, further, that the instrument is not sufficiently authenticated.

Thereafter, plaintiffs offered in evidence a deed marked Exhibit A. H. No. 2, in words and figures as follows: (the nature of the case requiring that it should be set forth in extenso):

This Indenture, made the eighth day of January, in the year one thousand eight hundred and seventy, between John S. Watts of Santa Fe, in the Territory of New Mexico, U. S. A., party of the first part, and Christopher E. Hawley of Wilkes-barre, in the State of Pennsylvania, U. S. A., party of the second part, Witnesseth, That the said party of the first part, for and in consideration of the sum of one dollar and other valuable consideration, lawful money of the United States of America, to me in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has remised, released, and quit-claimed, and by these presents do remise, release, and quit-claim unto the said party of the second part, and to his heirs and assigns, forever, All that certain tract, piece or parcel of land, situate, lying and being in the Santa Rita Mountains in the Territory of Arizona, U. S. A., containing one hundred thousaid acres, be the same more or less, granted to the heirs of Louis Marie Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed dated on the
550 1st day of May, A. D. 1864, Bounded and described as follows: Beginning at a point three miles west by South from the Building known as the Hacienda de Santa Rita, running thence north twelve miles, thirty-six chains and forty-four links, running thence east twelve miles, thirty-six chains, and forty-four links, thence south twelve miles, thirty-six chains and forty-four links, thence west twelve miles, thirty-six chains and forty-four links, to the point or place of beginning: The said tract of land being known as location No. 3 of the Baca Series; together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; And also the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances; To Have and to Hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

In Witness Whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

JOHN S. WATTS. [SEAL.]

Sealed and delivered in the presence of—
WM. H. CLARKSON.
CHARLES NETTLETON.

STATE OF NEW YORK,
City & County of New York, ss:

Be it remembered that on this 8th day of January, A. D. 1870, before me, Charles Nettleton, a Commissioner of the Territory of Arizona, in and for the State of New York, duly appointed and commissioned by the Governor of said Territory, duly sworn and dwelling in said city of New York, personally appeared John S. Watts, personally known to me to be the same person described in and who executed the within Instrument of writing, who acknowledged to me that he had executed the same for the uses and purposes therein mentioned, and that the same was his free and voluntary act and deed.

In Witness Whereof I have hereunto set my hand and affixed my official seal.

[OFFICIAL SEAL.] CHARLES NETTLETON,
Commissioner for Arizona in New York.

STATE OF NEW YORK,
City & County of New York, ss:

Be it remembered That on this 8th day of January, A. D. 1870, before me, Charles Nettleton, a Notary Public in and for the city, County and State of New York, duly commissioned and sworn, and dwelling in the said city of New York, personally came John S. Watts, to me personally known to be the same person described in and who executed the within Instrument, who signed and sealed the same in my presence, and acknowledged to me that he executed the same as his act and deed, freely and voluntarily, and for the uses and purposes therein mentioned.

In Testimony Whereof, I have hereunto set my hand and affixed my Notarial Seal.

CHARLES NETTLETON,
Notary Public in and for the City & County of New York, State of New York.

Vu au Consulat general de France aux Etats Unis pour
551 legalization de la signature ci dessus de Mr. Charles Nettleton, Notaire Public pour et dans la ville et l'Etat de New York.

New York, le 8 Janvier, 1870, pour le Consul gerant le Consulat general compeche et par delegation Le Chancelier.

[OFFICIAL SEAL.] G. ROUHAUD.

No. 38.
Art. 63.
Solvet, $2.86.

(On back:)—Recorder's Office, Tucson, Pima Co., A. T., Filed and recorded at request of Wm. W. Belknap, 9th May A. D. 1885, at 9 A. M. Book 13 Deeds of Real Estate, pages 67, 68 & 69. A. B. Sampson, County Recorder. (Official Seal.)

To which defendants objected on the ground that it is incompetent, irrelevant and immaterial, and that no foundation has been laid for its introduction, and upon the further ground that it does not appear to have been executed or acknowledged in accordance with the laws of Arizona in force at the date of the instrument.

The plaintiffs then offered in evidence a power of attorney given by Christopher E. Hawley, grantee in the foregoing instrument, to James Eldredge, of Paris, France, dated and acknowledged January 13, 1870, recorded in Pima County (Arizona) Records, May 9, 1885, marked as Exhibit A. H. No. 3, authorizing said Eldredge, irrevocably, to negotiate, sell, dispose of and convey all his right, title, and interest, in the lands conveyed by the heirs of Baca to Watts and by Watts conveyed to him as set forth and described in Exhibit A. H. No. 2, aforesaid.

To which defendants objected on the ground that: it is incompetent, irrelevant and immaterial, and because it is not executed or acknowledged in accordance with the laws of Arizona in force at the date of the execution of the instrument; and upon the further ground that no sufficient foundation has been laid for its introduction.

Plaintiffs then introduced in evidence a deed from said James Eldredge to John C. Robinson of Binghamton, New York, executed and acknowledged July 7, 1879, marked as Exhibit A. H. No. 4, which deed describes the same land described in Exhibit A. H. No. 2 aforesaid, and among other things contains the following:

552 Including in this conveyance all the rights and claims of the heirs of said Baca, and of those persons claiming under them, that is to say, all the right, title, and interest of the said party of the first part and of said Hawley to said location, or to any location elsewhere, under the Act of Congress approved June 21st, 1860, or under any decision of any Department of the Government, made or hereafter to be made, or Act of Congress passed or to be passed.

To which defendants objected on the ground that the same is incompetent, irrelevant, and immaterial, and that there is no sufficient foundation laid for its introduction.

Plaintiffs then offered in evidence a copy of a deed from Christopher E. Hawley by James Eldridge, his attorney-in-fact, to said John C. Robinson, dated and acknowledged May 5, 1884, and recorded in Pima County, Arizona, May 9, 1885, marked Exhibit A. H. No. 5, which deed described the land described in Exhibit A. H. No. 2 and among other things contained the following: "Including in this conveyance all the rights and claims of the heirs of said Baca; or of those persons claiming under them, that is to say all the right, title and interest of the said party of the first part to said location, or to any location elsewhere under the Act of Congress approved June 21st, 1860, or under any decision of any Department of the Government, made or hereafter to be made, or Act of Congress passed or to be passed."

To which defendants objected on the ground—

that the same is incompetent, irrelevant and immaterial, and that no foundation has been laid for its introduction. There is further objection to this on the ground that it does not purport to have been executed by anybody. The signatures are typewritten. It is incompetent, irrelevant and immaterial, and it purports to be a copy and there is no authentication from any person whatsoever who is in possession of the original, and there is no accounting for the original; and the original would not be competent.

Plaintiffs then offered a deed from said John C. Robinson to S. A. M. Syme, of Washington, D. C., dated and acknowledged April 30, 1896, and recorded in Pima County, Arizona, Sep-
553 tember 25, 1896, marked Exhibit A. H. No. 6, which deed conveyed all the right, title, and interest of the party of the first part in and to the tract of land situated in Pima County, Arizona, containing some 50,000 acres, described as follows:

The upper or north one-half of a tract of land of some 100,000 acres known as Baca Location or Baca Float No. 3 and bounded as follows: Beginning at a point 6 miles 18 chains and 22 links north of a point 3 miles west by south from the building known as the Hacienda de Santa Rita, thence north 6 miles, 18 chains and 22 links, thence east 12 miles, 36 chains and 44 links, thence south 6 miles, 18 chains and 22 links, and thence west 12 miles, 36 chains and 44 links to the beginning.

To which defendants objected on the ground that it is incompetent, irrelevant and immaterial, and that no sufficient foundation has been laid for its introduction.

Plaintiffs then offered deed from said John C. Robinson to Alex. F. Mathews of Lewisburg, W. Va., dated September 22, 1893, acknowledged September 25, 1893, and recorded in Pima County, Arizona, October 12, 1893, marked Exhibit A. H. No. 7, which deed contains the following:

Whereas the said John C. Robinson by deed dated December 1, 1892, and recorded in the office of the County Recorder of Pima County, Arizona Territory, did convey to John W. Cameron of Washington, D. C., a certain tract of land in said County and Territory, which is described as follows, viz: that certain tract of land which is the southern half of the tract of land known as Baca Float No. 3, containing one hundred thousand (100,000) acres, more or less, the said southern half thereby conveyed by said Robinson to said Cameron containing fifty thousand (50,000) acres, more or less, and is bounded as follows, viz: beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, and running then North six miles, eighteen chains and twenty-two links, thence east twelve miles, thirty-six chains and forty-four links, thence south six miles, eighteen chains, and twenty-two links, thence west twelve miles, thirty-six chains and forty-four links to the beginning; together with all the tenements and appurtenances thereunto belonging;

And whereas by virtue of and as appears by a certain declaration of trust executed by the said John W. Cameron, dated the 28th

day of November, 1892, and recorded in said office, and especially by the fourth (4th) section or paragraph of said declaration of trust, I am entitled to have and receive and to have paid me by the said Cameron ten (10) per centum of the money to be realized nett by said Cameron from the sale of said land when by him sold; and whereas out of said net proceeds of such sale a note of $250 held by the Broome County National Bank of New York, on
554 which I am endorser, is to be paid; and whereas as such endorser I have now taken up and hold said note; and whereas I have sold and desire now to assign and convey unto the said Alex. F. Mathews all of my right, title and interest in and to the said land above described, and to the nett proceeds thereof, for my benefit to the extent of the said ten per cent, and for my indemnity as endorser on said note, by virtue of said declaration of trust, or otherwise—Now this Indenture Witnesseth, that for and in consideration of the premises and in further consideration of the sum of ten (10) Dollars to me in hand paid, the receipt whereof is hereby acknowledged, I, the said John C. Robinson, party of the first part, do hereby grant, convey and assign to the said Alex. F. Mathews, without any recourse upon me whatever, all my right, title and interest in and to said land above described, and to the net proceeds thereof by virtue of the said declaration of trust, or otherwise. And I do hereby authorize, empower and direct, as far as I am concerned and interested therein, the said John W. Cameron to convey and grant the said above described tract of land of fifty thousand (50,000) — in Pima County, Arizona Territory, to the said Alex. F. Mathews, free from any and all claims, demands and interest on my part therein, or in the net proceeds thereof in and under the said declaration of trust, or in any manner, in any way or upon any ground whatever. And I hereby release, acquit and discharge the said Cameron from the application of any part of the net proceeds of said sale to the payment of said note of $250 upon which I am endorser, which has been paid and taken up by me and which I herewith surrender and turn over canceled to the said Alex. F. Mathews.

To which defendants objected on the ground that the instrument is incompetent, irrelevant, and immaterial, and that no foundation had been laid for its introduction.

Plaintiffs then offered a deed from James Eldredge to said Alex. F. Mathews, dated September 22, 1893, acknowledged September 30, 1893, and recorded in Pima County, Arizona, October 12, 1893, marked Exhibit A. H. No. 8, which deed contains the following:

Whereas John C. Robinson, of Binghamton, New York, by deed dated December 1st, 1892, and recorded in the office of the County Recorder of Pima County, Arizona Territory, did convey to John W. Cameron a certain tract of land in said County and Territory, which is described as follows, viz: that certain tract of land which is the southern half of the tract of land known as Baca Float No. 3, containing one hundred thousand (100,000) acres, more or less,
555 the said southern half thereby conveyed by said Robinson to said Cameron containing fifty thousand (50,000) acres, more

or less, and is bounded as follows, viz: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence North six miles, eighteen chains and twenty-two links; thence east twelve miles, thirty six chains and forty-four links, thence south six miles, eighteen chains twenty-two links, thence west twelve miles, thirty-six chains and forty-four links to the beginning; together with all the tenements and appurtenances thereunto belonging; and whereas by virtue of and as appears by a certain declaration of trust executed by the said John W. Cameron, dated the 28th day of November, 1892, and recorded in said office, and especially by the 4th paragraph or section of the said declaration of trust, that of the nett proceeds of sale of said land when sold by said Cameron, after the payment of thirty-five per cent (35%) and $250, in addition, to the persons and in the manner prescribed by said section, the residue, being sixty-five per cent (65%) less said $250, is to be paid to the said James Eldredge or as he may in writing direct; and whereas by said section of said declaration it is provided that 15% of said nett proceeds, which is a part of said 35%, should be held by said Cameron until a settlement is made between James Eldredge and Charles A. Eldredge, at which settlement a certain paper or contract held by said Charles A. Eldredge, being a contract between him and John C. Robinson, should be canceled; and whereas I, the said James Eldredge, have sold and desire now to convey and assign unto the said Alex. F. Mathews all of my right, title, and interest in and to the said land above described, and to the net proceeds thereof by virtue of the said declaration of trust, or otherwise; Now This Deed Witnesseth that for and in consideration of the premises and in further consideration of the sum of ten dollars to me in hand paid the receipt whereof is hereby acknowledged, I, Jas. Eldredge, party of the first part, do hereby grant, convey and assign to the said Alex. F. Mathews, party of the second part, without any recourse upon me whatever, all of my right, title, and interest in and to said land above described and to the nett proceeds thereof, by virtue of the said declaration of trust, or otherwise. And I do hereby authorize, empower, and direct, so far as I am concerned and interested therein, the said John W. Cameron to convey and grant the said above described tract of land fifty-thousand (50,000) acres in Pima County, Arizona Territory, to the said Alex. F. Mathews, free from any and all claims, demands and interest on my part therein, or in the net proceeds thereof in and under the said declaration of trust, or in any manner, in any way or upon any ground whatever. And further this deed witnesseth, and I the said James Eldredge hereby declare and make known that the said settlement between me and Charles A. Eldredge, mentioned and provided for in said section 4 of said declaration of trust, has been fully and satisfactorily made, that the contract therein named between Charles Eldredge and John C. Robinson has been canceled and is now by me turned over to the said Mathews, and that the said Charles A. Eldredge will be entitled to said 15 per cent of said proceeds of said land, and that he has

the right to convey, dispose of and assign his said interest, as he has done by deed of even date with this deed to the said Alex. F. Mathews.

556 To the introduction of which, defendants made the same objection offered to Exhibit A. H. No. 7 aforesaid.

Plaintiffs then offered, subject to the same objections on the part of the defendants as was made to Exhibit A. H. No. 7, a deed dated September 22, 1893, acknowledged September 28, 1893, and recorded in Pima County, Arizona, October 12, 1893, from Charles A. Eldredge of Fond du Lac County, Wisconsin, to said Alex. F. Mathews, marked Exhibit A. H. No. 9, which deed contains the following:

Whereas John C. Robinson, of Binghampton, New York, by deed dated December 1, 1892, and recorded in the office of the County Recorder of Pima County, Arizona Territory, did convey to John W. Cameron, of Washington, D. C., a certain tract of land in said county and Territory, which is described as follows, viz: That certain tract of land which is the southern half of the tract of land known as Baca Float No. 3, containing one hundred thousand (100,000) acres, more or less, the said southern half *half* thereby conveyed by said Robinson to the said Cameron, containing fifty thousand (50,000) acres more or less, and is bounded as follows, viz: beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north six miles, eighteen chains and twenty-two links, thence east twelve miles thirty-six chains and forty-four links, thence south six miles, eighteen chains and twenty-two links, thence west twelve miles, thirty-six chains & forty-four links to beginning; together with all the tenements & appurtenances thereunto belonging; And whereas by virtue of and as appears by a certain declaration of trust executed by the said John W. Cameron, dated the 28th day of November, 1892, and recorded in said office, and especially by the fourth (4th) section or paragraph of said declaration of trust, fifteen (15) per centum of the money to be realized nett by the said Cameron from the sale of said land is to be held by him for my benefit until a settlement is made by me with one James Eldredge, and a certain contract between me and John C. Robinson with reference to my said interest is canceled; And whereas I have sold and desire now to assign and convey unto the said Alex. F. Mathews all of my right, title and interest in and to the said land above described and to the nett proceeds thereof, by virtue of the said declaration of trust, the said contract with John T. Robinson or otherwise; And whereas the said settlement has been made between me and the said James Eldredge, and the said contract between myself and said John C. Robinson has been canceled and surrendered, so that I am now entitled to receive and have paid to me the said fifteen (15) per cent of the nett proceeds of said land when sold by said Cameron—Now This Deed Witnesseth that for and in consideration of the premises and in further consideration of the sum of ten (10) dollars to me in hand paid, the receipt whereof is hereby acknowledged, I do hereby grant, convey and assign to the said Alex. F. Mathews, without any recourse whatever upon

557 me, all of my right, title and interest in and to said land above described, and to the nett proceeds thereof, by virtue

of the said declaration of trust, the said contract with John C. Robinson aforesaid, or otherwise; And I do hereby authorize, empower and direct, so far as I am concerned and interested therein the said John W. Cameron to convey and grant the said above described tract of land of fifty thousand (50,000) acres in Pima County, Arizona Territory, to the said Alex. F. Mathews, free from any and all claims, demands and interest on my part therein, or in the nett proceeds thereof, in and under the said declaration of trust, or in any manner, in any way, or upon any ground whatever.

Plaintiffs then offered, subject to the same objection on the part of the defendants as to Exhibit A. H. No. 7, a deed from John W. Cameron and Mrs. A. T. Belknap, both of Washington, D. C., to said Alex. F. Mathews, dated September 22, 1893, acknowledged September 28, 1893, and recorded in Pima County, Arizona, October 12, 1893, marked Exhibit A. H. No. 10, which deed contains the following:

Whereas John C. Robinson, of Binghampton, New York, by deed dated Decr. 1, 1892, and recorded in the office of the County Recorder of Pima County, Arizona Territory, did convey to the said John W. Cameron a certain tract of land in said County and Territory, which is described as follows viz: that certain tract of land which is the southern half of the tract of land known as Baca Float No. 3, containing one hundred thousand (100,000) acres, more or less, the said southern half thereby conveyed by said Robinson to said Cameron containing fifty thousand (50,000) acres, more or less, and is bounded as follows, viz: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north six miles, eighteen chains and twenty-two links, thence east twelve miles, thirty-six chains, and forty-four links, thence south six miles, eighteen chains, and twenty-two links, thence west twelve miles, thirty-six chains and forty-four links, to the beginning; together with all the tenements and appurtenances thereunto belonging; And whereas by virtue of and as appears by a certain declaration or trust executed by the said Jno. W. Cameron, dated the 28th day of November, 1892, and recorded in said office, and especially by the 4th paragraph or section of the said declaration of trust, he, the said John W. Cameron in his own right & individually, and the said Mrs. A. T. Belknap are entitled to have and receive and have paid them ten percent, that is, five percent to each, of the money to be realized nett by said Cameron from the sale of said land when sold by him; And whereas he the said John W. Cameron and Mrs. A. T. Belknap have sold and desire now to assign and convey unto the said Alex. F. Mathews all of our right, title and interest in and to the said land above described, and to the nett proceeds thereof, by virtue of the said declaration of trust, or otherwise—Now, This Deed Witnesseth that for and in consideration of the premises and the further consideration of the sum of ten (10) Dollars to us in hand paid, the receipt whereof is hereby acknowledged, we, the said John W. Cameron and A.
558 T. Belknap parties of the first part, do hereby grant, convey and assign to the said Alex. F. Mathews, party of the second part, without any recourse upon us whatever, all of our right, title

and interest in and to said land above described, and to the nett proceeds thereof, by virtue of the said declaration of trust, or otherwise; And we do hereby authorize, empower and direct, so far as we are concerned and interested therein, the said John W. Cameron to convey and grant the said above described tract of land of fifty thousand (50,000) acres in Pima County, Arizona Territory, to the said Alex. F. Mathews, free from any and all claims, demands and interest on our part therein, or in the nett proceeds thereof, in and under the said declaration of trust, or in any manner, in any way, or upon any ground whatever.

Plaintiffs then offered, subject to the same objection on the part of the defendants as made to Exhibit A. H. No. 7, a deed from said John W. Cameron to said Alex. F. Mathews, dated September 25, 1893, acknowledged September 30, 1893, and recorded in Pima County, Arizona, October 12, 1893, marked Exhibit A. H. No. 11, which deed contains the following:

Whereas John C. Robinson, by deed, dated December 1st, 1892, and recorded in the office of the County Recorder of Pima County, in the Territory of Arizona, conveyed to the said John W. Cameron a certain tract of land in said County and Territory, being the southern half, containing fifty thousand (50,000) acres, more or less, of the tract known as the Baca Float No. 3, which contains one hundred thousand (100,000) acres, more or less, and which said southern half of fifty thousand acres thus conveyed is hereinafter more
559 particularly described and conveyed: And whereas the said John W. Cameron, as appears from a declaration of trust executed by him, dated the 28th day of November, 1892, and recorded in said office, held the said land under said deed from the said John T. Robinson upon certain trusts and conditions in manner and form following, viz:

"1st. With the absolute right on my" (his) "part to sell the said property as a whole or in parcels at such time or times, in such manner or manners, and upon such term or terms as to me" (him) "may seem best and proper without any liability or responsibility whatever upon the purchaser or purchasers thereof of any part or parts of the said property to see to the application to be made by me" (him) "of the purchase money therefor or any part thereof."

"2nd. With the absolute right and authority on my" (his) "part to grant an option or options on said property, or any part or parts thereof in such manner or manners, for such time or times, and upon such terms as to me" (him) "may seem right."

"3rd. And like absolute right and authority on my" (his) "part to borrow money upon the faith and credit of such property at such times, in such sums, and upon such terms as to me" (him) "may seem right and proper, and to secure the payment of all sums of money thus borrowed by me" (him) "by mortgages or deeds of trust upon said property without any liability or responsibility upon the part of the party or parties advancing and lending such money to see to the application and use to be made of the same."

"4th. Of the money realized by me" (him) "nett from the sale of the said land, and when and as realized I" (he) "am" (is) "to

pay ten (10) percent to the said John C. Robinson; ten percent to be retained and be divided equally, 5% each, to Mrs. A. T. Belknap and myself" (himself) "John W. Cameron, both of Washington, D. C.; fifteen (15) percent to be held by me" (him) "until a settlement is made between James Eldredge and Charles A. Eldredge, at which settlement a certain paper or contract held by said Charles A. Eldredge, being a contract between John C. Robinson and Charles A. Eldredge, is to be canceled" $250 for the payment of a note for that amount held by the Broome County National Bank of New York, on which John C. Robinson is endorser, and the balance to be paid to James Eldredge, or as he may in writing direct"; And whereas the said John W. Cameron has heretofore made no sale of any part of said property as provided for and allowed by the said first section of said declaration of trust as above quoted; and whereas he has given no option on said property, or any part thereof, which is now outstanding and in force, and which has not expired or been surrendered, under the second section of said declaration; And whereas under the said third section of said declaration he has created but one debt upon the faith and credit of said property, viz, a debt of five thousand ($5,000) Dollars, evidenced by a note executed by the said John W. Cameron for that amount to S. A. M. Syme, dated Decr. 5, 1892, due twelve months after date, with interest from date, and the payment of which is secured, by a trust deed on said property, executed by said Cameron to W. L. Bridges, Trustee, dated Decr. 5th, 1892, and recorded in the office of said County Recorder, in Book 10, Mortgages, at pages 460, 461, 462, which debt still remains wholly unpaid and is not yet due, and which said lien created by said trust deed is still in force; And whereas the persons, who, under and in accordance with the said fourth (4th) section of said declaration of trust, are entitled to all the nett proceeds of the sale of said property when sold to the full benefit thereof, viz, John C. Robinson, John W. Cameron
560 and Mrs. A. T. Belknap, Charles A. Eldredge and James Eldredge, have, by their several and respective deeds, all dated September 22, 1893, and to be recorded in said office, sold, assigned and conveyed all their right, titles, and interest, respectively, in and to said *rp*operty, or to the said nett proceeds thereof, by virtue of said declaration of trust, or otherwise, to the said Alex. F. Mathews, and have by their said respective deeds authorized, empowered and directed the said John W. Cameron to convey the said property to the said Alex. F. Mathews, free from any and all claims, demands, or interests therein, or in the nett proceeds thereof, on their part, by virtue of the said declaration of trust, or otherwise; And whereas it also and further appears, from the said deed from Jno. C. Robinson to said Alex. F. Mathews, dated September 22nd, 1893, for his interest in said property or its proceeds, that the note, provided for in said fourth section of the said declaration of trust, of $250 held by the Broome County National Bank of New York, upon which the said John C. Robinson is endorser, has been by him taken up and canceled and surrendered, and that he has released, acquitted and discharged the said property, its said net proceeds, and

the said John W. Cameron from all liability for its payment; And whereas it also and further appears from the said deed from James Eldredge to said Alex. F. Mathews, dated Sept. 22, 1893, for his interest in the said property, or its proceeds, that the settlement, mentioned in the said fourth (4th) section of said declaration of trust, to be made between him and the said Charles A. Eldredge, has been fully and satisfactorily made and that the said contract in said fourth (4th) section mentioned, between John C. Robinson and Charles A. Eldredge, has been canceled and surrendered—Now, Therefore, This Deed Witnesseth that for and in consideration of the premises and in further consideration of the sum of ten (10) Dollars to him in hand paid, the receipt whereof is hereby acknowledged, the said John W. Cameron, party of the first part, doth hereby bargain, sell, grant and convey, subject to the lien thereon created by the said deed of trust to W. L. Bridges, trustee, dated Decr. 5, 1892, the said real estate conveyed to him as aforesaid by John C. Robinson by said deed dated December 1st, 1892, and which real estate is described as follows: viz: that certain tract of land situated in Pima County, in Arizona Territory, which is the southern one-half of the tract of land known as Baca Float No. 3, containing one hundred thousand (100,000) acres, more or less, which said southern half hereby conveyed contains fifty thousand (50,000) acres, more or less, and is bounded as follows, viz: beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, thence north six miles, eighteen chains and twenty-two links, thence east twelve miles, thirty-six chains, and forty-four links, thence south six miles, eighteen chains, and twenty-two links, thence west twelve miles, thirty-six chains, and forty-four links to the beginning; together with all the tenements and appurtenances thereunto belonging, and also all the estate, right, title and interest, property, possession, claim and demand, whatsoever, as well in law as in equity, of the party of the first part in and to the above described premises and every part and parcel thereof; to have and to hold said claims and rights, and all and singular the above mentioned and described premises unto the said party of the second part, his heirs and assigns, forever.

561 Plaintiffs then offered in evidence a deed from said Samuel A. M. Syme and Laura G. Mathews, Eliza Patton Mathews, Mason Mathews, Charles G. Mathews and Henry A. Mathews, devisees of Alex. F. Mathews, deceased, acting in their individual capacity, and said Mason, Charles G. and Henry A. Mathews acting in their capacity of executors of the Will of Alex. F. Mathews, deceased, to C. C. Watts and D. C. T. Davis, Jr., trustees, dated February 8, 1907, acknowledged February 8, 1907, and February 11, 1907, which deed contains the following:

That for and in consideration of the sum of four thousand dollars in money and other valuable consideration paid and to be paid by the parties of the second part to the parties of the first part, the receipt whereof is hereby acknowledged, the said parties of the first part have bargained, sold and do hereby grant and convey, with covenants of special warranty, unto the parties of the second part,

their successors and assigns, forever, all that certain tract or parcel of land, and all their right, title and interest, both legal and equitable, therein, situate, lying and being in the Counties of Pima and Santa Cruz, in the Territory of Arizona, known as Baca Float No. 3 and granted to the heirs of Luis Maria Baca, by the United States, by Act of Congress approved June 21, 1860, and afterward conveyed by the said Baca heirs to John S. Watts by deed bearing date the 1st day of May, 1864, and recorded May 14th, 1864, in the office of the Court of Pruebas of the County of Santa Fe, Territory of New Mexico, in Book "C," at pages in said book marked 551, 552, 553, 554 and 555, and also recorded in the office of the Court of Bruebas of the County of San Miguel, Territory of New Mexico, in the 3rd book of Documents at pages marked 51, 52, 53, 54, 55, 56, 57 and 58, August 24th, 1866, and bounded and described as follows: commencing at a point one mile and a half from the base of the Salero Mountain in a direction north forty-five degrees east, of the highest point of said mountain, running thence from said beginning point west twelve miles thirty-six chains and forty-four links, thence south twelve miles, thirty-six chains and forty-four links, thence east twelve miles, thirty-six chains and forty-four links, thence north twelve miles, thirty-six chains and forty-four links, to the place of beginning, containing ninety-nine thousand two hundred and eighty-nine acres and thirty-nine hundredths of an acre, more or less; the said tract of land being known as Baca Float No. 3, including in this conveyance all the rights and claims of the heirs of the said Baca, and of all persons claiming under them, that is to say, all the right, title and interest of the said parties of the first part to said Baca Float No. 3, as above described, or to any land located elsewhere, in lieu thereof, under Act of Congress approved on June 21st, 1860, or under any decision of any department of the Government made or hereafter to — made or Act of Congress passed or to be passed.

This conveyance is made with the express power to the said parties of the second part to sell and convey, to lease, mortgage or otherwise dispose of the said real estate, or any part thereof, as to them may seem best, and the purchaser or purchasers in case of such sale shall not be required to see to the application or disposition of the purchase money, and shall be held acquit of any responsibility.

562 It is further covenanted and agreed that the parties of the first part will give to the parties of the second part such other and further deeds and assurances as in their judgment be necessary to carry into effect the provisions of this deed.

To which defendants objected on the ground:

that the instrument is incompetent, irrelevant and immaterial, and that no foundation has been laid for its introduction, and that there is no evidence of the representative capacity in which certain of the parties named purported to act, and that the certificate of acknowledgment is not in accordance with the laws of Arizona, and that it purports to be a conveyance of real estate situate in the Territory of Arizona by representatives of deceased persons with no evidence of

authority on behalf of any court in Arizona or other tribunal for authorizing such conveyance.

And thereupon Conrad H. Syme was duly sworn and testified on behalf of said plaintiffs:

That he is an attorney at law practicing in the District of Columbia since 1895; that he is the son of the S. A. M. Syme mentioned in the foregoing exhibits; that his father was home, sick with the grip, and could not be present; that he had advised his father in relation to his interest in this litigation for about fifteen years; that he had seen each of the deeds heretofore offered in evidence and had known them since 1895 (except those executed thereafter and that they had been in his father's possession, until "about three years ago" (meaning about 1907) when the witness saw his father turn over said "deeds, all of them, to General Watts and Mr. Davis."

On cross-examination, he deposed that every one of the foregoing Exhibits had been in his father's possession either in Washington or in Alexandria, Virginia, during the period mentioned.

Dabney C. T. Davis, Jr., one of the plaintiffs, was thereafter called as witness, and deposed as follows:

563 That he is an attorney at law, practicing at Charleston, West Virginia, and that C. C. Watts, another plaintiff, is also an attorney at law, practicing at the same place; that he is acquainted with the signatures of the parties to the instrument known as Exhibit A. H. No. 12 and that they are the signatures of the parties recited; that he knew Alex. F. Mathews in his lifetime, that Laura G. was wife of said Alex.; that Alex. died prior to February 8, 1907; that said Alex. was his (witness') father-in-law; that Eliza Patton Mathews was a daughter of said Alex., who also left sons, i. e., Mason, C. G., and Henry A., that Alex. left a will and that Mason, C. G. and Henry A., were the executors thereof (to which defendants objected on the ground of irrelevancy, incompetency, and immateriality); that he knew S. A. M. Syme's handwriting and that his signature was attached to said Exhibit A. H. No. 12; that all the foregoing deeds and papers were in his custody and had been obtained by him from S. A. M. Syme.

On cross-examination, witness testified that the foregoing papers were turned over to him on or prior to February 8, 1907, both in his individual and representative capacity. He was asked whom he represented; to which, on the objection of his counsel, he made no answer. He then deposed that he represented the Mathews estate—not technically as administrator or trustee of said estate, but as one of the trustees in the deed (Exhibit A. H. No. 12), wherein certain money going to A. F. Mathews, subsequently becoming the interest of his heirs, would be represented by C. C. Watts and himself. He declined to state the nature of his trust, but said that he was individually interested in the subject matter of said Exhibit No. 12. Asked if there were any document in his possession or under his control or of which he had knowledge, relating to that interest, which

had not been produced, he deposed that there was; that, according to his recollection, it was in his office Charleston, West Virginia; that it was executed may be a year before the execution of Exhibit A. H. No. 12; that, as he recalled it, the papers were between S. A. M. Syme, A. F. Mathews, C. C. Watts and himself; that there is no other paper nor instrument on which the conveyance filed as Exhibit A. H. No. 12 is based; and that there is no written contract or agreement existing between himself and any personal representative of A. F. Mathews with reference to his relationship to the subject matter described in said Exhibit No. 12.

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Thereafter, plaintiffs offered in evidence authenticated copy of a deed purporting to run from the heirs of Baca to John S. Watts, filed as Exhibit A. H. No. 13, but being in substance the same as Exhibit A. H. No. 1, save that certain acknowledgments are in the Spanish language, that it contains translations into English of said certificates, and that it is certified as a copy of a deed on record in Book 26, D. R. E. pp. 547, et seq., Pima County, Arizona, as certified by the Recorder of said County, September 29, 1911; whereas said Exhibit No. 1 contains no such certification.

To which defendants objected on the ground that it is incompetent, irrelevant, and immaterial, the authority or the parties not being shown.

Plaintiffs then offered, as Exhibit A. H. No. 14, another copy of said deed which was recorded in Pima County, Arizona, January 13, 1894, in Book 26, D. R. E., pp. 364, et seq., to which defendants offered the objections noted as to said Exhibit A. H. No. 13.

Thereupon plaintiffs offered in evidence an authenticated copy of a conveyance for Christopher E. Hawley by James Eldredge, his attorney in fact, it being the same as Exhibit A. H. No. 5, except that it is duly authenticated as a copy of the record in Pima County, Arizona, records. Said copy, filed as Exhibit A. H. No. 15, was objected *bo* by defendants on the ground that it is incompetent, irrelevant, and immaterial, that it relates to land not involved in this suit, that the original is not accounted for, that — is not shown that the principal was alive at the date of its execution and that the power of attorney had not terminated.

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As Exhibit No. 16, plaintiffs offered an authenticated copy of the last will and testament of Alex. F. Mathews, dated September 22, 1900, and probated in Greenbrier County, West Virginia, January 2, 1907; wherein decedent nominated his sons Mason, Charles G., and Henry A. Mathews, as executors thereof, and devised his estate to be distributed in accordance with the laws of West Virginia in force concerning the estates of decedents who die intestate, authorizing and empowering his executors to sell any of his property for the purpose of converting it into money in order to make distribution and apportionment, and to execute all papers necessary to carry out such sales without recourse to any Court, and to execute, on behalf of the estate, any papers proper, necessary or convenient for carrying out any agreements into which he might have entered, without recourse to any Court, with the same force and effect as if said executors were acting under the authority and direction of a court of competent jurisdiction.

To which defendants interposed the objection that it is incompetent, irrelevant, and immaterial.

Thereafter, plaintiffs offered (Exhibit A. H. No. 17) copy of deed (same as Exhibit A. H. No. 1), save that this was an authenticated copy as recorded in the County of Sante Fe, New Mexico, the other deeds having been from records of new counties into which the district within which this land is situated has from time to time been divided. To which defendants objected on the ground that it is incompetent, irrelevant, and immaterial; that no proper
566 foundation had been laid for its introduction; that it does not purport to be a copy of an original document, or copy thereof, but merely a copy of a record, and that there is no proof that the original deed was executed and acknowledged by the parties purporting to be the heirs of Luis Maria Baca, or any evidence accounting for the absence of the original documents.

567 Thereupon, Dabney C. T. Davis, Jr., being recalled was asked when he received information to the effect that there had been a homestead entry made or commenced by one Henry Ohm; to which he replied that it was within a week from November 28th, 1908.

Then Mr. Noble, of counsel for plaintiffs stated that he had communicated to Mr. James W. Vroom, one of the plaintiffs, the fact that testimony on behalf of the plaintiffs was about to be closed, and asking what, if anything, further Mr. Vroom desired to have done; that this communication had been sent to two addresses, office and residence, but was returned to Mr. Noble through the mails. Whereupon, plaintiffs, with the explanation just stated, closed on behalf of the plaintiffs.

Thereupon, by stipulation, the parties hereto admitted as Exhibits the following deeds, subject to any and all objections as to competency, revelancy, or materiality:

(1). A certain instrument in writing dated October 26, 1899, acknowledged on December 9, 1899, on November 1, 1899, and on November 29, 1899, recorded in County Recorder's office, County of Santa Cruz, State of Arizona, August 2, 1909, purporting to be a deed executed by I. Howe Watts, Mary A. Wardwell, Louise Wardwell, Frances A. Bancroft, and Albert L. Bancroft (her husband), conveying to John Watts all their right, title, and interest in and to the land described in plaintiffs' Exhibit A. H. No. 1, aforesaid.

(2). A certain instument in writing dated October 25, 1899, acknowledged October 26, 1899, and October 30, 1899, recorded in the office of the County Recorder, Santa Cruz County, Arizona, January 2, 1913 (Book 7, Deeds, pp. 115-118), purporting to be a deed executed by John Watts, I. Howe Watts, Mary A.
568 Wardwell, Louise Wardwell, Frances A. Bancroft and Albert L. Bancroft, by John Watts, their attorney in fact, describing themselves as "sole and surviving heirs of John S. Watts, deceased." conveying to James W. Vroom an undivided one-half interest in and unto the land known as Baca Float No. 3, according to the location of June 17, 1863, more particularly described in plaintiffs' Exhibit A. H. No. 1, aforesaid.

(3). A certain instrument in writing, duly certified by the County Recorder, County of Pima, State of Arizona, April 3, 1913, from the records of his office, dated and acknowledged August 3, 1899, recorded in said records August 12, 1899 (Book 31, Deeds, p. 103), purporting to be a deed executed by Alex. F. Mathews and S. A. M. Syme, to the Arizona Copper Estate, a corporation organized and existing under the laws of Arizona, conveying all their right, title, and interest in and unto a tract of land, situate in said County of Pima, known as Baca Float No. 3.

(4). A certain instrument in writing, dated and acknowledged August 3, 1899, recorded in said Pima County Records, aforesaid, August 12, 1899 (Book 15, Mortgages, pp. 60-62), executed by said Arizona Copper Estate, by James Simmons, Vice President, sealed with the corporate seal and attested by Philip K. Reynolds, Secretary, reconveying to said Alex. F. Mathews and S. A. M. Syme the land known as Baca Float No. 3, and after reciting that said Arizona Copper Estate had executed certain promissory notes aggregating the sum of $100,000, describing the same, to said Mathews, Syme, one U. L. Boyce, and Alex. F. Mathews, providing that—

if said notes are paid according to their tenor and effect then these presents shall become void and the estate hereby granted shall cease, determine and be void, otherwise to remain in full force and effect.

569 It is hereby stipulated and agreed that the foregoing condensed statement of the testimony and evidence introduced on behalf of plaintiffs and including the matter thereafter admitted under stipulation, is true and complete, and that the same may become a part of the record, for the purpose of appeal, in lieu of the full testimony and exhibits, of which this statement is a digest.

C. EDW. WRIGHT,
Attorney for Defendants and Appellant.
HARTWELL P. HEATH,
Attorney for Plaintiffs.

Approved:

THOS. H. ANDERSON.
Justice.

[Endorsed:] In the Supreme Court of the District of Columbia. In Equity. No. 28207. C. C. Watts et al. vs. Franklin K. Lane, Secretary of the Interior, et al. Statement of Pl'ffs.' evidence. Department of the Interior, Office of the Assistant Attorney General.

Endorsed on cover: District of Columbia Supreme Court. No. 2584. Franklin K. Lane et al., appellants, vs. Cornelius C. Watts et al. Court of Appeals District of Columbia. Filed Aug. 9, 1913. Henry W. Hodges, clerk.

338 Addition to record per stipulation of counsel.

Court of Appeals of the District of Columbia.

October term, 1913.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Frederick Dennett, Commissioner of the General Land Office, appellants,
vs.
CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., JOHN Watts, and James W. Vroom. } No. 2584.

Filed September 2, 1913.

In the Court of Appeals of the District of Columbia.

October term, 1913.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Frederick Dennett, Commissioner of the General Land Office,
vs.
CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., JOHN Watts, and James W. Vroom. } No. 2584.

Addition to the record by stipulation of counsel.

It is hereby agreed that the original document on file in the General Land Office, of which Defendants' Exhibit No. 12, on pages 160–162 of the Transcript of Record, in the above entitled cause, contains a blue-pencilled marginal annotation opposite the second paragraph thereof (beginning "as I am personally unacquainted," etc.) in words and figures as follows: "* See letter fr Hon Watts of March 27 1864 inclosing R & R certificates."

339 The photographic copy of said original, filed as said Defendants' Exhibit No. 12, but faintly reproduced this annotation and the same was inadvertently overlooked in the transcription of the record in the office of the Clerk of the Supreme Court of said District. It is, therefore, agreed this 27th day of August, 1913, that this stipulation may be printed by the Clerk of the Court of Appeals as an "Addition to the Record."

C. EDWARD WRIGHT,
Attorney for Appellant.
WELDON M. BAILEY,
Attorney for Appellee.

[Endorsed:] No. 2584. Franklin K. Lane et al., appellants, vs. Cornelius C. Watts et al. Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Sept. 2, 1913. Henry W. Hodges, Clerk.

340 Second addition to record per stipulation of counsel.

Court of Appeals of the District of Columbia.

October term, 1913.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Clay Tallman, Commissioner of the General Land Office, appellants,
vs.
CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., JOHN Watts, and James W. Vroom.
No. 2584.

Filed October 16, 1913.

Court of Appeals of the District of Columbia, October Term, 1913.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Clay Tallman, Commissioner of the General Land Office, appellants,
vs.
CORNELIUS C. WATTS ET AL., APPELLEES.
No. 2584.

Addition to the record per stipulation of counsel.

It is hereby agreed that the following corrections of errors in the transcript of record shall be printed by the clerk of this court as an addition to the record in the above-mentioned case:

341

Page.	Line.	
8	2	Change "1865" to "1863."
	3	from bottom, change "1863" to "1864."
10	1	Change "1869" to "1860."
	11	Change "3d" to "2d."
13	3	from bottom, change "November 26, 1906," to "November 28, 1908."
17	4	from bottom, change "April 1, 1864," to "April 9, 1864."
161	28	Put "Washington" in a parenthesis.
	31	Add "See Watts' letter 'intra'."
162	7	Put "Washington" in a parenthesis.
	11	Add "See Watts' letter 'intra'."
168	7	Change "1862" to "1882."
	15	Change "June 2, 1860" to "June 21, 1860."
194	28	Change "May 21, 1886" to "May 21, 1866."
	40	Change "John A. Watts" to "John H. Watts."
305	14	Change "June 17, 1860" to "June 21, 1860."
315	17	Change "June 11, 1913" to "July 11, 1913."

Page.	Line.	
336	29	Change "Thereupon" to "Thereafter."
	36	Change "I. Howe Watts" to "J. Howe Watts" and insert before "Mary A. Wardell" the words "and by."
	44	Change "I. Howe Watts" to "J. Howe Watts."
337	19	After "Matthews" insert "trustee."

C. EDW. WRIGHT,
Attorney for Appellants.
GEO. H. BREVILLIER,
W. M. BAILEY,
Attorneys for Appellees.

[Endorsed:] In the Court of Appeals of the District of Columbia. No. 2584. Franklin K. Lane, Sec'y of the Interior, et al. vs. C. C. Watts et —. Second addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Oct. 18, 1913. Henry W. Hodges, Clerk.

342 In the Court of Appeals of the District of Columbia.

October term, 1913.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, ET AL.,
vs.
C. C. WATTS ET AL. } No. 2584.

Counsel for appellant suggest the retirement of Mr. Frederick Dennett, one of the appellants, as Commissioner of the General Land Office and the appointment to that office of Mr. Clay Tallman. Wherefore the appellant moves that said Clay Tallman be substituted as appellant herein for said Frederick Dennett.

C. EDW. WRIGHT,
Attorney for Appellant.

(Endorsed:) In the Court of Appeals of the District of Columbia. Docket No. 2584. Franklin K. Lane, Secy. of the Interior, et al., vs. C. C. Watts et al. Motion substituting party appellant. Court of Appeals, District of Columbia. Filed Oct. 16, 1913. Henry W. Hodges, Clerk.

343 Thursday, October 16th, A. D. 1913.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Frederick Dennett, Commissioner of the General Land Office, appellants,
vs.
CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., JOHN Watts, and James W. Vroom. } No. 2584.

The retirement of Frederick Dennett and the appointment of Clay Tallman as Commissioner of the General Land Office having been

suggested it is, on motion of Mr. C. E. Wright, of counsel for the appellants, now here ordered by the court that the said Clay Tallman, Commissioner of the General Land Office, be, and he is hereby, made a party appellant in this cause in the place and stead of the said Frederick Dennett, retired.

344 Thursday, October 16th, A. D. 1913.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Clay Tallman, Commissioner of the General Land Office, appellants,
vs.
CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., JOHN Watts, and James W. Vroom. } No. 2584.

The argument in the above-entitled cause was commenced by Mr. C. E. Wright, attorney for the appellants, and was continued by Messrs. Herbert Noble and G. H. Brevillier, attorneys for the appellees, and was concluded by Mr. J. W. Bailey, attorney for the appellees.

345 In the Court of Appeals of the District of Columbia.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Clay Tallman, Commissioner of the General Land Office, appellants,
vs.
CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., JOHN Watts, and James W. Vroom. } No. 2584.

Opinion.

(Mr. Justice Robb delivered the opinion of the court.)

This appeal is from a decree in the Supreme Court of the District enjoining the Secretary of the Interior and the Commissioner of the General Land Office from proceeding in the matter of certain attempted entries under the public-land laws upon lands which, the decree finds, were selected and located by the heirs of Luis Maria Cabeza de Baca on June 17, 1863, and known as Baca Float No. 3, the title to which, the decree further finds, passed out of the United States and vested in said heirs on April 9, 1864. The decree further directs the filing of the field notes and plats of survey of said float for the purpose of defining the outboundaries thereof and segregating the same from the public lands of the United States.

By the treaties of Guadalupe Hidalgo and Mesilla the territory embracing the present States of New Mexico and Arizona was ceded to the United States. Prior thereto Mexico had made numerous grants of land within this territory. As was natural, this country enacted legislation looking to the determination of the validity and

extent of those grants. The act of July 22, 1854 (10 Stat., 308), created the office of surveyor general for the Territory of New Mexico and made it his duty to examine into all claims for lands within the limits of that Territory and to make report thereof to Congress. Under the provisions of this act the heirs of Baca, by John S. Watts, their attorney, presented to the surveyor general of New Mexico their claim to a Mexican grant called Las Vegas Grandes. The town of Las Vegas, at about the same time, filed its petition for the same tract of land. The surveyor general reported to
346 Congress that in his opinion "the land embraced in either of the two grants is lawfully separated from the public domain and entirely beyond the disposition of the General Government, and that in the absence of one the other would be a good and valid grant." He suggested that inasmuch as he had no power to decide between conflicting claimants they should be referred to "the proper tribunals of the country for the adjudication of their respective claims." On May 19, 1860, the Senate Committee on Private Land Claims, reporting on these conflicting grants, said: "To this tract the two claimants are, first, the heirs of Luis Maria Baca, who claim under a grant made by the provincial department of Durango to said Baca and his seventeen sons on May 29, 1821, which grant was ratified and confirmed on Feb. 1, 1825, by the departmental assembly of New Mexico. This grant was in fee and is a genuine and valid title. Second, the town of Las Fegas, or Las Vegas. This town claims under a grant made on March 25, 1835, * * *." The committee, after commenting upon the confusion that would naturally result if the respective claimants were remitted to the courts for the adjustment of their conflicting claims, said: "The claimants under the title to Baca, also represented by Judge Watts as their counsel, have expressed a willingness to waive their older title in favor of the settlers if allowed to enter an equivalent quantity of land elsewhere within the Territory; and your committee can not doubt that Congress will cheerfully accept the proposal, which, indeed, would undoubtedly have been acceded to by Mexico if the Territory had remained hers, and to whose rights and duties the United States have succeeded."

Thereupon, by act of June 21, 1860 (12 Stat., 71), it was provided (sec. 6): "That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the same tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number; and it shall be the duty of the surveyor general of
347 New Mexico to make survey and location of the land so selected by the said heirs of Baca when thereunto required by them: *Provided, however*, That the right hereby granted shall continue in force for three years from the passage of this act, and no longer." The Commissioner of the General Land Office, in a communication to the surveyor general of New Mexico, directed attention to this act

and said: "To give this law timely effect, you will give priority in surveying private claims to this claim. * * * You will proceed to have the exterior lines of Las Vegas town claim property run and connected with the lines of public surveys. The exact area of the Las Vegas town tract having been thus ascertained, the right will accrue to the Baca claimants to select a quantity equal to the area of the tract elsewhere in New Mexico of vacant land, not mineral, in square bodies not exceeding five in number. You will furnish them with a certificate, transmitting at the same time a duplicate to this office, of their right and the area they are to select in five square parcels. Should they select in square bodies, according to the existing line of the surveys, the matter may be properly disposed of by their application, duly endorsed and signed with your certificate, designating the parts selected by legal divisions or subdivisions and so selected as to form five separate bodies in square form. Then the certificate, thus endorsed, is to be noted on the records of the register and receiver of Santa Fe and sent on here by these officers for approval. Should the Baca claimants select outside the existing surveys, they must give such distinct descriptions and connection with natural objects in their application to be filed in your office as will enable the deputy surveyor when he may reach the vicinity of such selections in the regular progress of the surveys to have the selection adjusted as near as may be to the lines of the public surveys which may hereafter be established in the region of those selections.

In either case the final conditions of the certificate to this office must be accompanied by a statement from yourself and reg-
348 ister and receiver that the land is vacant and not mineral."

Thereafter, it was ascertained by the surveyor general of New Mexico that the Las Vegas grant contained 496,446.96 acres, and the heirs of Baca were accordingly notified, about December, 1860, that they were entitled to select, in not more than five square bodies, an amount of land equal to said area upon any of the unoccupied lands, not mineral, of New Mexico. In Oct., 1862, there was filed an application on behalf of said Baca heirs to locate one of their so-called floats at a place called Bosque Redondo. The description of this float, as given in the application, was somewhat vague and indefinite. This was float No. 3 and was to cover 99,289.39 acres. On Jan. 18, 1863, the attorney for the Baca heirs, Mr. Watts, addressed a letter to the Commissioner of the General Land Office asking for leave to withdraw said attempted location, and on Feb. 5th, following, leave was granted, the commissioner in his letter saying: "As the application has not been ripened into a specific location, no locality having been designated according to any recognized lines of the public surveys, nor reported by the surveyor general as definitely acted upon, this office accedes to the request of Mr. Watts to withdraw the application."

Thereafter, on June 17, 1863, a second application for the location of said Baca float No. 3 was filed with the surveyor general of New Mexico, as follows: "I, John S. Watts, the attorney of the heirs

of Don Luis Maria Cabeza de Baca, have this day selected as one of the five locations confirmed to said heirs under the 6th section of the act of Congress approved June 21st, 1860, the following tract, to-wit, commencing at a point one mile and a half from the base of the Solero Mountain in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles thirty-six chains and forty-four links, thence south twelve miles thirty-six chains and forty-four links, thence east twelve miles thirty-six chains and forty-four links,
349 thence north twelve miles thirty-six chains and forty-four links to the place of beginning, the same being situate in that portion of New Mexico now included, by act of Congress approved February 24th, 1863, in the Territory of Arizona. Said tract of land is entirely vacant, unclaimed by anyone, and is not mineral to my knowledge." On the same day the surveyor general prepared a certificate of the application to be sent to the Commissioner of the General Land Office. This certificate concludes with the words: "Said location is hereby approved." On the next day the surveyor general sent this certificate to the commissioner, and in his letter of transmittal said: "As this location is far beyond any of the public surveys, I have not deemed it necessary to procure any certificate from the register and receiver of the land office, as from the nature of the case they can not officially know anything concerning it." On July 18, following, the commissioner wrote the surveyor general concerning this application, saying, inter alia: "Your approval of the location under consideration is found to have ignored the imperative condition that the lands selected at the base of Solero Mountain now included by act of Congress approved February 24, 1863, in the Territory of Arizona, is vacant land and not mineral. Before the application of location No. 3 of the heirs aforesaid can be approved by this office it is necessary that our instructions of the 26th July, 1860, should be complied with by furnishing a statement from yourself and register and receiver that the land thus selected and embracing one-fifth of the claim, or $99,289\frac{32}{100}$ acres, is vacant and not mineral."

On April 2, 1864, while the surveyor general of New Mexico was in Washington, he filed in the office of the Commissioner of the General Land Office an acknowledgment of the receipt of the foregoing letter of July 18, 1863, of the commissioner, and, among other things, said: "As I am personally unacquainted with that region of country, I can not certify that the land in question is 'vacant and not mineral' or otherwise. Those facts can only be determined by actual examination and survey." On the margin of this
350 letter, and opposite the words quoted, appears the following notation: "See letter fr. Hon. Watts of March 27, 1864, inclosing R. & R. certificates." The letter to which this notation refers is addressed to "W. Wrightson, Esq.," and reads as follows: "You will please find enclosed the certificate of the register that the location made in Arizona is vacant and not mineral, so far as the records of

their office show. I hope this certificate will enable you to get the location confirmed." In the certificates referred to, dated Mar. 25, 1864, the receiver certified that the lands contained in this float "are vacant and not mineral, so far as the records of this office show (not having been surveyed)." The register certified that these lands "are not surveyed, and from all information in this office are vacant and not mineral." On April 9th, following, request having been made for the survey of this land, the Commissioner of the General Land Office, in a communication to the surveyor general of Arizona, said: "By an examination of the papers herewith inclosed relating to the 3rd of the series of the Luis Maria Baca grants confirmed by the 6th section of an act of Congress approved June 21, 1860, you will perceive that the location of the one-fifth part of said grant as set forth by the claimants has been approved by the surveyor general of New Mexico, under whose jurisdiction the application properly came at the date of the approval. * * * In order to avoid delay you are hereby authorized, whenever said claimants shall pay or secure to be paid to you a sum sufficient to liquidate all the expenses incident thereto, office work included, to contract with a competent deputy surveyor and have the claim numbered 3 of the series surveyed as described in the inclosed application. Transcripts of the field notes and plats certified in accordance with the requirements of the law will be transmitted to this office and will constitute the muniments of title, the law not requiring the issue of patents on these claims." The commissioner then directed that the deputy surveyor be instructed how to mark the out-
boundaries of the location. The commissioner then quoted
351 said certificate dated June 17, 1863, of the surveyor general of New Mexico and appended the following certificate of his own:

"GENERAL LAND OFFICE, *April 9, 1864.*

"LEVI BASHFORD, Esq., *Surveyor General, Tucson, Arizona.*

"SIR: The foregoing statement and the certificate of Surveyor General Clark having been submitted to this department and having undergone a careful examination, the location being approved by him to perfect title under the authority of the act approved June 21, 1860, application for survey having been made. Instructions (copy herewith attached) have been given to Surveyor General Levi Bashford, of Arizona, in which Territory the lands located now are, to run the lines indicated and forward complete survey and plat to be placed on file for future reference as required by law.

"(Signed) J. M. EDMONDS, *Com'r.*"

On April 30, 1866, the attorney for the heirs of Baca, in a communication to the Commissioner of the General Land Office, directed attention to said location of June 17, 1863, to the fact that war in that part of the Territory of Arizona and the hostility of the Indians had prevented a personal examination and that when the subsequent examination of the location was being made by Mr. Wrightson it was

found that much of the land intended to be included in the location had been left out; that Mr. Wrightson had been killed by the Indians and that, by reason of the mistake that had been made in the initial point of location, no survey had been made. Permission was therefore asked to change the initial point of the location which, of course, would have effected a material change in the location. It was further stated in this communication that the land embraced in the change was of the same character as that included in the approved location. The Commissioner thereupon, on May 21, 1866, directed the surveyor general of New Mexico, under whose jurisdiction the matter then came, to cause a survey to be executed in accordance with the amended description: *Provided*, that by so doing the outboundaries of the grant thus surveyed would embrace vacant lands
352 not mineral. The heirs of Baca were thereupon notified that a survey in accordance with the amended description would be made providing they deposited a sum sufficient to defray the expenses. As no deposit was made the directions contained in this communication were not carried out. The department finally ruled (29 L. D., 44) that the heirs of Baca were bound by the selection of June 17, 1863, because a survey in accordance with the amended description of April 30, 1866, would amount to a "complete change of location."

On Nov. 10, 1904, the Commissioner of the General Land Office recommended that the exterior boundaries of Baca Float No. 3 should be surveyed "for the purpose of administering the public land laws and in order that applicants under said laws may be forced to no unnecessary trouble, expense, or delay in perfecting titles to which they believe they have a right under the general land laws." Thereupon the Secretary of the Interior directed said survey to be made and one was made through Philip Contzen, deputy surveyor, who, on Nov. 23, 1906, duly filed the plats and field notes in the office of the surveyor general of Arizona. While this survey was in progress the surveyor general made examination of the character of the land and collected considerable supposed evidence concerning its mineral character prior to 1863 and reported the result of his investigation to the Department of the Interior with a recommendation that said Baca Float No. 3 be rejected. Thereupon the Commissioner of the General Land Office ordered a hearing before the surveyor general to determine whether said lands were at the time of said location vacant and nonmineral, and this order was finally sustained on appeal to the Secretary of the Interior. It further appears that certain applications for homestead entries within the limits of this float have been made and that the department has allowed them to proceed, but has withheld final action thereon until final decision upon this Baca Float.

The final hearing of the case was upon bill, answer, and documentary evidence.

353 Appellants contend that the title to this land was not to pass from the United States to the heirs of Baca unless and

until the surveyor general should survey and examine the same and report to the department that such survey and examination disclosed that the land was vacant and not mineral June 17, 1863. Appellees insist, on the other hand, and the court below adopted their view, that the title to this land passed out of the United States and vested in the heirs of Baca on April 9, 1864. If title did so pass, it is plain that what remained to be done after the survey had been made, namely the filing of the plat and field notes, was a mere ministerial act, the doing of which the court might direct. Ballinger vs. Frost, 216 U. S. 240; Board of Liquidation vs. McComb, 92 U. S. 531. It is equally plain that the court would have power to restrain the department from attempting to exercise jurisdiction and control over this land after it had vested in the heirs of Baca, to their injury. Noble vs. Union River Logging R. R., 147 U. S. 165; Phil. Co. vs. Stimson, 223 U. S. 605, 620. We will proceed, therefore, to determine this the vital question in the case.

In Shaw vs. Kellogg, 170 U. S. 312, there was involved Baca grant No. 4. In that case the department, not being fully satisfied that the land selected was nonmineral, although the proper surveyor general and register and receiver had furnished certificates to that effect, approved the location, survey and field notes, but directed the surveyor general to add to his certificate of approval the special reservation stipulated by the statute that the land thus selected should not embrace mineral lands nor interfere with any other vested rights, if such should exist. The Land Office noted on its maps that this tract had been segregated from the public domain and had become private property, and so reported to Congress. The grantees entered into possession, fenced the tract, and paid all taxes assessed upon it by the State. It was held that the action taken by the Land Department was a finality and that the title then passed, and hence that the limitation attempted to be
354 inserted by the surveyor general, under the direction of the department, was beyond the power of executive officers to impose. While the facts of that case differ quite materially from the facts of this, the opinion of the court contains much that is helpful in the determination of the questions arising in this case. The court then directed attention to the fact that said Act of June 21, 1860, "was a final disposition by Congress of certain claims under Mexican grants for lands situated in the Territory of New Mexico;" that some of those claims had been confirmed as reported and in toto; and that the confirmation operated as a grant de novo and amounted to a relinquishment by Congress of all rights of the United States to the premises. After referring to certain other claims, including that of the Baca heirs, the court said: "Obviously, the thought was that these claims should not only be finally but speedily disposed of. It was not contemplated that the title should remain unsettled, a mere float for an indefinite time in the future." The court observed, further, that at the time of this legislation there were but few persons living in New Mexico; that it contained large areas of arid

lands; that its surface was broken by a few mountain chains and crossed by a few streams. "It was," said the court, "within the limits of this Territory, whose conditions and natural resources were but slightly known, that Congress authorized this location." The court further observed that while Congress did not intend to grant any lands then known to be mineral, it could not have been intended that a grant should be rendered nugatory by any future discoveries of minerals. The court pointed out that Congress evidently did not consider that there was any great probability of the discovery of mineral wealth in New Mexico, for by said act it confirmed claims, amounting to millions of acres, with no reservation of mines then known or to be thereafter discovered within their limits; and that no appropriation was made for the exploration of claims to be thereafter located, although it required the completion of this location within three years.

355 The location in the present case was made in virtue of the same act of Congress that was before the court in Shaw vs. Kellogg. The tract of land located was square in form, so that if the initial point was definitely determined no difficulty whatever would be encountered thereafter in fixing the identity of the location. In the first letter of the commissioner to the surveyor general of New Mexico, he was told that should the Baca claimants select outside of the existing surveys, they must give such distinct descriptions and connection with natural objects as would enable the deputy surveyor, "when he might reach the vicinity of such selections in the regular progress of the surveys," to have the selections adjusted, as near as might be, to the lines of the public surveys; that the final certificate to the Land Office must be accompanied by the statement from the surveyor general, register, and receiver, as to the vacant and nonmineral character of the land. The application for the location of this part of the grant was thereupon made, and in that application, it will be noted, the claimants strictly complied with the requirement that they give such distinct description and connection with natural objects as would permit of the identification of the tract. Indeed, while this application was filed in 1863 and the actual survey was not made for more than forty years, no difficulty whatever seems to have been encountered in tracing the outboundaries of the land therein described. It was probably owing, in part, to the definite character of this description that the surveyor general, in forwarding the application to the Land Office, added his certificate approving the location of this grant. Owing to conditions then obtaining, and to which the court referred in Shaw vs. Kellogg, the surveyor general deemed it unnecessary to procure any certificate from the register and receiver. The Land Office, however, not being satisfied upon this point, immediately notified the surveyor general that before the approval by the Land Office of said application of location prior instructions should be complied with, and the office

356 furnished with a statement from the surveyor general, register, and receiver, as to the vacant and nonmineral character of

this land. Subsequent to the date of this communication from the Land Office, the surveyor general went to Washington and there filed in the Land Office, as we have seen, on April 2, 1864, his acknowledgment of the letter of the office requiring such certificates, saying that inasmuch as he was unacquainted with the region of country comprising the location, he could not certify as requested, and that the facts could only be determined by actual examination and survey. The certificates of the register and receiver were then on their way to Washington, for they are dated March 25, 1864. Counsel for appellants insist that these certificates did not reach the Land Office until after the action of the commissioner on April 9th, approving this location and directing the survey of the land. Whether they did or not is immaterial, for it is apparent, from the notation on the surveyor general's letter, "See letter of Mr. Watts inclosing R. & R. certificates," that the Land Office came into possession of information of a sufficiently satisfactory character as to cause it to reconsider and recede from its previous decision requiring further proof as to the nonmineral character of this land. Giving to this notation the effect to which it is now entitled, and indulging in the inferences naturally deducible therefrom, we must assume that when the communication of April 9th was sent forth by the commissioner he knew of the views entertained by the register and receiver concerning the character of this land, and that he considered those views and the other evidence before him sufficient, in the circumstances of the case, to justify him in approving the location. It must be borne in mind that the surveyor general had previously written that the location was so far beyond any public surveys that he did not even deem it necessary to procure any certificate from the register and receiver, and that, as observed by the Supreme Court in Shaw vs. Kellogg, it was not then thought by anyone that there was any great probability of the discovery of mineral wealth in the territory. Indeed, it is not
357 probable that this grant was then considered of any particular value. At all events, we find opposite the statement of the surveyor general that, he being personally unacquainted with the region of country embracing this location, the facts as to its mineral character could only be determined by actual examination and survey, the notation admittedly made by the Land Office officials specifically directing attention to the letter of Mr. Watts inclosing the certificates of the register and receiver and expressing the hope that such certificates would result in the confirmation of the location. We must assume from the record before us that the Land Office was then in possession of information upon which it was satisfied to act, notwithstanding the lack of knowledge on the part of the surveyor general. An analysis of the communication of the commissioner to the surveyor general of Arizona lends cogency to this view. Attention is there drawn to the aproval of the location by the surveyor general of New Mexico, "under whose jurisdiction the application properly came at the date of the approval." The surveyor general of Arizona is then authorized, whenever the claimants shall pay or

secure to be paid a sum sufficient to liquidate the expenses incident thereto, to have "the claim numbered 3 of the series surveyed as described in the enclosed application." He was to transmit to the Land Office transcripts of the field notes and plats duly certified. There was not a word in this communication requiring or suggesting an examination of this land at the time of this survey for the purpose of determining whether it was nonmineral in character. The sole duty devolving upon the surveyor general in carrying out these instructions was to make the survey and, when made, to transmit to the Land Office his field notes and plats, that the same might "consitute the muniments of title, the law not requiring the issue of patents on these claims." Still further proof of the intent of the Land Office is found in the certificates which, for some reason, the commissioner deemed necessary to accompany the specific directions included in the communication of even date, for therein it is
358 recited that the foregoing statement and certificate of the surveyor general of New Mexico had been submitted to the department "and having undergone a careful examination, the location being approved by him to perfect title under the authority of the act approved June 21, 1860, application for survey having been made," instructions had been given to the surveyor general of Arizona "to run the lines indicated and forward complete survey and plat to be placed on file for future reference as required by law." We think the conclusion irresistible, from the language of this certificate, that the commissioner, having carefully considered all the facts in the case, concluded to adopt the approval of the surveyor general of New Mexico of this location to perfect title under the authority of said act, and in order completely to segregate this land from the public domain ordered the survey.

A survey was necessary. "The general rule being to exact a survey, the grant here under consideration could only be exempted from this requirement by an express statement in the act of Congress indicating an intention to depart from the rule in the particular instance." Stoneroad vs. Stoneroad, 158 U. S., 240, 250. The statute of June 21, 1860, under which this location was made, clearly contemplates that a survey shall be made. But when the Land Office, upon whom devolved the duty of passing upon the location of this land, had acted, we think the title became absolutely confirmed in the heirs of Baca and that the survey which the Land Office directed to be made was essential only "for the purpose of definitely segregating the land, to which the right was confirmed, from the public domain, and thus finally fixing the extent of the rights of the owners of the grant." Stoneroad vs. Stoneroad, 158 U. S., 240. And when the title to this land passed out of the United States and vested in these heirs, the finding as to the character of the land could not thereafter be disturbed by the Land Office. "One officer of the Land Office is not competent to cancel or annul the act of his predecessor. That is a judicial act and

359 requires the judgment of a court." United States vs. Stone, 2 Wall., 525. The claim of jurisdiction to readjudicate the character of the land, which we have found passed out of the United States, amounted to an attempt to deprive the heirs of Baca of their property, without due process of law. Noble vs. Union River Logging R. R., 147 U. S., 165; Moore vs. Robbins, 96 U. S., 530.

Counsel for appellants have raised the question whether the proper surveyor general originally approved the location of this grant. The basis for this contention is the act of Congress of Feb. 24, 1863 (12 Stat., 64), to provide a temporary government for the Territory of Arizona. That government, however, was not established until January, 1864. A surveyor general for Arizona was provided for by this act, but he was to receive no salary until his active duties commenced. It is conceded that he did not open an office in Arizona until January, 1864. The act of June 21, 1860, under which this grant was located, expressly provided that the surveyor general of New Mexico should make the survey and location, of course under the direction and supervision of the Land Office. At the time he assumed jurisdiction to act, the surveyor general of Arizona had not assumed the duties of his office, and, as ruled by the Commissioner of the Land Office in his communication of April 9, 1864, to the surveyor general of Arizona, he unquestionably had jurisdiction of the application at the date of its approval by him. But this is of small moment here for, after all, it made little difference which surveyor general acted. The material question is whether the Land Office, upon whom devolved the ultimate responsibility, approved the location. That approval was given, and the rights of these heirs then became fixed. It is very clear, we think, that the act under which the location was made contemplated present action by the Land Office and not action fifty years deferred.

We do not think the efforts to change the location in question affect the situation here. The department itself has repeatedly ruled that all those efforts were abortive, and hence that
360 the claimants must be remitted to this location. In their answer, appellants aver that there were conflicting Mexican grants to some of the land included in this float, and that it therefore was not subject to location in 1863. It is conceded that no rights under those grants had been asserted agreeably to the provisions of said act of July 22, 1854 (10 Stat., 308). Under that act the Secretary of the Interior promulgated regulations requiring all claimants to appear and present evidence of their title. The matter, therefore, did not become sub judice until the filing of the claim. In other words, when this location was made by the Baca heirs the alleged Mexican grants, to which attention is now drawn, were mere undisclosed claims. Clearly the existence of such undisclosed claims did not deprive the Land Office of jurisdiction over the land embraced in this location. But this is a question with which

we need not be concerned. If, as suggested by the court below, adverse claims are made to any portion of this tract of land, the questions arising out of such claims will properly be adjudicated in the courts where the lands are located. The question with which we are concerned is whether, upon this record, title passed out of the United States and vested in the Baca heirs in 1863.

The act of June 21, 1860, imposed upon the surveyor general of New Mexico the duty to make survey of this land when required by the heirs of Baca, and the act of June 2, 1862 (12 Stat., 410), merely required that claims or grants derived from a foreign State or Government should be surveyed at the expense of the claimants. This grant was not derived from a foreign State or Government, but was made to compensate the heirs of Baca for the relinquishment of their foreign grant. We think, therefore, that the Land Office was in error when it required the deposit of the estimated cost of survey as a prerequisite to its being made at all.

Appellees base their claim of title upon a deed dated May 1, 1864, to John S. Watts, which was recorded within one year from its date.

361 This deed purports to have been executed by the heirs of Baca. Inasmuch as it is more than thirty years old and bears no suspicious indicia, it proves itself. Ford vs. Ford, 27 App. D. C., 401; Applegate vs. Lexington, 117 U. S., 255; Foote vs. Brown, 81 Conn., 218; Hodge vs. Palm, 117 Fed., 396. In the absence of any evidence attacking appellees' chain of title, it is enough if they have established a prima facie title. Clearly they have done this.

Decree affirmed, with costs.

Affirmed.

362 Monday, December 1st, A. D. 1913.

October term, 1913.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Clay Tallman, Commissioner of the General Land Office, appellants, *vs.* CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., JOHN Watts, and James W. Vroom.	No. 2584.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per Mr. Justice Robb, December 1, 1913.

363 In the Court of Appeals, District of Columbia.
October term, 1913.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, et al., appellants,
vs.
CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., JOHN Watts, and James W. Vroom.
No. 2584.

Motion for allowance of appeal to the Supreme Court of the United States.

Comes now the appellants, by their attorneys, and moves the court to allow an appeal to the Supreme Court of the United States to review the decision of this court herein; and for cause show:

1. That appeal lies under paragraph 6 of section 250 of the Judicial Code, being the act of March 3, 1911, for that the construction of the act of June 21, 1860, is drawn in question by the appellants, defendants in the court below, who asserted and relied upon a construction of said statute which does not admit that title to land selected under the provisions of said act can pass or could have passed out of the United States prior to the acceptance by the Department of the Interior and the filing therein of an approved plat and field notes of a survey whereby a surveyor general has made location of the selection of lands, reporting them as vacant and nonmineral, so far as known, at the date of selection.

2. That an appeal lies under paragraph 5 of said section of said code for that the validity of the authority as well as the existence and scope of the power and the duty of the appellants, both officers of the United States, as exercised or attempted to be exercised in and over the subject matter of the suit, is drawn in question.

364 3. That appeal lies under the first paragraph of said section of said code, for that the jurisdiction of the trial court to proceed in said cause in the absence of the United States as a necessary party or to review and interfere with or to control the acts of the Secretary, in respect to a case pending before him, through injunction, is in issue.

PRESTON C. WEST,
Assistant Attorney General.
C. EDWARD WRIGHT,
Assistant Attorney for Appellants.

(Endorsed:) In the Court of Appeals of the District of Columbia. Appeal No. 2584. Franklin K. Lane, Secy. of the Interior, et al. vs. C. C. Watts et al. Motion to allow appeal. Court of Appeals, District of Columbia. Filed Dec. 9, 1913. Henry W. Hodges, clerk.

365 Tuesday, December 9th, A. D. 1913.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Clay Tallman, Commissioner of the General Land Office, appellants,
vs.
CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., JOHN Watts, and James W. Vroom. } No. 2584.

The motion for the allowance of an appeal to the Supreme Court of the United States in the above-entitled cause was submitted to the consideration of the court by Mr. C. E. Wright, of counsel for the appellants, in support of motion.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Clay Tallman, Commissioner of the General Land Office, appellants,
vs.
CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., JOHN Watts, and James W. Vroom. } No. 2584.

On consideration of the motion for the allowance of an appeal to the Supreme Court of the United States in the above-entitled cause, it is by the court this day ordered that said appeal be, and the same is hereby, granted.

366 Wednesday, December 10th, A. D. 1913.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Clay Tallman, Commissioner of the General Land Office, appellants,
vs.
CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., JOHN Watts, and James W. Vroom. } No. 2584.

It is ordered by the court that the order of December 9, 1913, allowing an appeal to the Supreme Court of the United States in the above-entitled cause be, and the same is hereby, vacated and set aside. And it is further ordered that the appellees herein be, and they are hereby, allowed until Monday next to file authorities in opposition to the allowance of an appeal to said court in this cause, with leave to the appellants to reply thereto, if so advised.

367 Monday, January 5th, A. D. 1914.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Clay Tallman, Commissioner of the General Land Office, appellants,
vs.
CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., JOHN Watts, and James W. Vroom.
No. 2584.

On consideration of the motion for the allowance of an appeal to the Supreme Court of the United States in the above-entitled cause it is by the court this day ordered that said appeal be, and the same is hereby, allowed. And it is further ordered that the mandate in said cause be, and the same is hereby, stayed until further order.

368 UNITED STATES OF AMERICA, *ss:*

To Cornelius C. Watts, Dabney C. T. Davis, jr., John Watts, and James W. Vroom, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 7th day of January, in the year of our Lord one thousand nine hundred and fourteen.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 7th day of January, A. D. 1914.
JOSEPH W. BAILEY.

369 In the Court of Appeals, District of Columbia.

FRANKLIN K. LANE, SECRETARY OF THE INterior et al., appellants,
v.
CORNELIUS C. WATTS ET AL.
No. 2584.
October term, 1913.

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Assignment of errors.

The appellants hereby assign the following errors in the decision of the court in the above entitled cause:

1. The court erred in holding that the trial court had jurisdiction to determine title to land in another jurisdiction.

2. The court erred in assuming jurisdiction to determine title to land in another jurisdiction.

3. The court erred in not recognizing and holding that the suit involves the determination of the title to land claimed by the United States.

4. The court erred in not recognizing and holding that the suit is essentially one against the United States and that the United States is a necessary but absent party.

5. The court erred in assuming jurisdiction to determine the question of title presented in the face of the fact that the United States is a necessary party but has not been, and could not be, made a
370 party because it has not in this behalf consented to be sued.

6. The court erred in holding that the trial court had jurisdistion to determine the question of title presented in the face of the fact that the United States is a necessary party but has not been, and could not be, made a party because it has not in this behalf consented to be sued.

7. The court erred in failing to recognize and hold that the purpose and prayers of the bill are to interfere with and control the action of the officers of the Land Department in the exercise of their proper jurisdiction and discretion in the determination and disposition of questions and matters affecting the so-called Baca Float No. 3 coming before them for decision.

8. The court erred in holding that the trial court had jurisdiction to interfere with and control the discretion and judgment of the officers of the Land Department in the decision and disposition of questions and matters affecting the so-called Baca Float No. 3 properly before them for determination and action.

9. The court erred in assuming jurisdiction to interfere with and control the discretion and judgment of the officers of the Land Department in the decision and disposition of questions and matters affecting the so-called Baca Float No. 3 properly before them for determination and action.

10. The court erred in not recognizing and holding that the question as to whether or not the legal title to the land embraced in
371 the so-called Baca Float No. 3 has passed out of the United States, was properly before the Land Department and involved the exercise of judgment and discretion by the officers of the Land Department in the determination thereof.

11. The court erred in not recognizing and holding that the determination of the question as to whether or not the legal title to the land embraced in the so-called Baca Float No. 3 had passed out of the United States involved the exercise of judgment and discretion by the officers of the Land Department in construing the act of June 21, 1860, and in passing upon the function and effect of the various proceedings had in respect of said Baca Float No. 3.

12. The court erred in not recognizing and holding that the ruling of the officers of the Land Department that under the act of June 21, 1860, the final act by which the legal title passes from the United

States is the acceptance by the department and the filing of approved plat and field notes of a survey whereby the surveyor general makes location as vacant and nonmineral of land selected by the heirs of Baca involved the exercise of judgment and discretion and is not subject to review in direct proceedings of this character.

13. The court erred in not recognizing and holding that, in the performance of their proper administrative functions and duties, the officers of the Land Department were called on to exercise judgment and discretion in determining whether or not the area embraced in the so-called Baca Float No. 3 is still part of the public domain and that their decision that it is and their administration of it as such can not be interfered with or controlled by the court in direct proceedings of this character.

372 14. The court erred in not recognizing and holding that in the performance of their proper administrative functions and duties, the officers of the Land Department were called upon by the present claimants to determine whether or not the action taken by the Commissioner of the General Land Office on April 9, 1864, passed out of the United States the legal title to the so-called Baca Float No. 3 and that their decision that it did not involved the exercise of judgment and discretion and can not be interfered with by the court in direct proceedings of this nature.

15. The court erred in not recognizing and holding that, in the performance of their proper administrative functions, the officers of the Land Department were called upon to determine whether or not the area embraced in the Sonoita and Calabazas and Tumacacori claims was reserved from selection by the Baca heirs and that their decision that it was so reserved involved the exercise of judgment and discretion and can not be interfered with by the court in direct proceedings of this nature.

16. The court erred in not recognizing and holding that, in the performance of their proper administrative functions, the officers of the Land Department were called upon to determine whether or not the area embraced in Tubac Township was occupied and not vacant and therefore reserved from selection by the heirs of Baca and that their decision that it was so reserved involved the exercise of judgment and discretion and can not be reviewed or interfered with by the court in direct proceedings of this nature.

373 17. The court erred in determining that legal title to the land involved passed out of the United States to the heirs of Baca on April 9, 1864.

18. The court erred in its construction of the act of Congress, approved June 21, 1860, in that it held that under said act legal title could, and did, pass prior to survey and filing of approved plat and field notes thereof.

19. The court erred in not holding that, under the act of June 21, 1860, it was necessary that the surveyor general, in the first instance, should determine the character of the land, as was held by the Supreme Court in Shaw v. Kellogg (170 U. S., 312).

20. The court erred in holding that the Commissioner of the General Land Office had authority, in the absence of a determination of the character of the land by the proper surveyor general, himself to determine the character of the land, approve the selection, and pass title from the United States.

21. The court erred in holding that the surveyor general of New Mexico was the proper officer to act upon the selection in question.

22. The court erred in not holding that, at the time the selection was tendered and until after April 9, 1864, the surveyor general of Arizona was the proper officer to act upon the said selection and determine, in the first instance, the character of the land embraced therein.

23. The court erred in holding that the Commissioner of the General Land Office, by his letter directing survey, dated April 9,
374 1864, determined the character of the land, approved the location, and passed the title.

24. The court erred in holding that appellees have shown title, as successors in interest to the heirs of Baca, sufficient to enable them or any of them to maintain this suit, in this, that they failed to find and to hold that there was no proof that the parties recited in the deed from the so-called heirs of Baca to John S. Watts (Plaintiff's Exhibit A. H., No. 1) were in fact the heirs of Baca, to whom the right to select land in lieu of the Las Vegas claim was granted; and in this, that they held, in effect, that said deed proved itself in the absence of any evidence that the grantors were the heirs of Baca and in the absence of possession and claim under said deed.

25. The court erred in holding that appellees have shown title, as successors in interest to the heirs of Baca, sufficient to enable them or any of them to maintain this suit.

26. The court erred in not holding that the Tumacacori, Calabazas, and San Jose de Sonoita grants, Mexican or Spanish grants, so far as they conflict with Baca Float selection No. 3, pro tanto defeated said selection.

27. The court erred in not holding that under the act of July 22, 1854, no affirmative action on the part of those claiming under alleged Spanish or Mexican grants was required in order to place the lands covered by said claims in reservation from other appropriation as a part of the public domain.

28. The court erred in sustaining the trial court in enjoining the appellants from further action upon the Ohm and other homestead and mineral entries pursuant to the ruling of the officers of the
375 Land Department that the land embraced therein, being within the Calabezas and Tumacacori claims, was not vacant land at the date of application for the so-called Baca Foat No. 3, and not appropriated thereby, and is now public land subject to entry.

29. The court erred in sustaining the trial court in enjoining the appellants to file the plat and field notes of the Contzen survey in the face of the fact, that the officers of the Land Department, in the exercise of their proper judgment and discretion, have decided, and

now contend, that in view of the report of the surveyor general that the land in question at the time of application for the so-called Baca Float No. 3 was not vacant and nonmineral within the meaning of the act of June 21, 1860, such plat and field notes should not be approved.

30. The court erred in not reversing the action of the trial court and directing the dismissal of the bill.

PRESTON C. WEST,
Assistant Attorney General.

C. EDWARD WRIGHT,
Assistant Attorney, for the Appellants.

(Endorsed:) In the Court of Appeals of the District of Columbia. No. 2584. Franklin K. Lane, Secretary of the Interior, et al. vs. C. C. Watts, et al. Assignment of Errors. Court of Appeals, District of Columbia. Filed Jan. 15, 1914. Henry W. Hodges, Clerk.

376 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 375 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, appellants, vs. Cornelius C. Watts, Dabney C. T. Davis, Jr., John Watts, and James W. Vroom, No. 2584, January term, 1914, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 17th day of January, A. D. 1914.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

(Indorsement on cover:) File No. 24040. District of Columbia Court of Appeals. Term No. 889. Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, appellants, vs. Cornelius C. Watts, Dabney C. T. Davis, Jr., John Watts, and James W. Vroom. Filed January 31, 1914. File No. 24040.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, ET AL., APPELLANTS,
v.
CORNELIUS C. WATTS ET AL.
No. 889.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO ADVANCE.

The Solicitor General respectfully moves the court to advance the above-entitled cause for hearing during the present term.

By the act of June 21, 1860 (12 Stat. 71), Congress authorized the heirs of Luis Maria Baca to select in lieu of the land covered by the grant to the town of Las Vegas an equal quantity of vacant nonmineral land in the then Territory of New Mexico to be located in square bodies not exceeding five in number. It subsequently developed that the grant to the town of Las Vegas contained nearly 500,000 acres; hence, under the act of 1860 the Baca heirs were authorized to locate five tracts of approximately 100,000 acres each. Four of these locations have been made and

finally settled and are not involved in this controversy, which concerns only the float or claim known as Baca No. 3, which was located in the then Territory of Arizona in 1863.

While the selection was made in 1863 and a survey ordered in 1864, no survey was actually made until the year 1905. In the meantime, parties claiming to own the float attempted in 1866 to amend the selection and so changed it as to embrace only a very small part of the land originally selected and other lands not included in the first location. The land covered by the amended selection was claimed as the location until 1899, when the Secretary of the Interior decided that there was no authority for the relocation and remitted the parties to such rights as they acquired under the original selection of 1863 (29 L. D. 44). During the period from 1866 to 1899 a great many entries and claims were made under the general laws falling without the selection of 1866 but within that of 1863, and in some instances patents were issued on such entries. In addition to the conflicts with public land entries, the selection of 1863 also conflicted with one valid Mexican grant and other private claims afterwards held to be invalid (171 U. S. 244).

In reporting on a public survey made in 1905 the surveyor general recommended that the entire selection be rejected upon the ground that when made in 1863 it embraced known mineral land and land that was occupied. From an order of the Commis-

sioner of the General Land Office allowing the claimants sixty days to apply for a hearing and offer evidence to show why the surveyor general's recommendation should not be accepted, the claimants appealed to the Secretary of the Interior contending that the department was without jurisdiction in the premises, upon the ground that the grant made by the act of 1860 was completely effectuated either by the selection in 1863 or by the order of survey in 1864. This contention was overruled by the Secretary, who on June 2, 1908, decided that under the act of 1860 title could not pass until after survey and finding that the land was of the character granted by the act. He thereupon approved the commissioner's action (36 L. D. 455); whereupon the claimants brought this suit in the Supreme Court of the District of Columbia to enjoin the Secretary from making any disposition of the lands under the public land laws. From a decree granting an injunction the Secretary appealed to the Court of Appeals, where the action of the lower court was affirmed.

In the defense offered on behalf of the Secretary it was urged that the United States was a necessary party to the suit, as it was the owner of the title to the land; that under the granting act title could not pass upon a mere order of a survey, but only by the approval of an actual survey; that the suit was only an attempt to secure a review of the Secretary's decision rendered by him in the exercise of his jurisdiction in a matter involving judgment and discre-

tion, and in any aspect was nothing less than an attempt to try title to land beyond the jurisdiction of the courts of the District of Columbia.

No taxes were assessed against these lands prior to the decision of the Supreme Court of the District of Columbia in this case, but since that time suits have been instituted against the grant claimants and the settlers to recover taxes amounting to many thousands of dollars. Pending a final determination of the matter the settlers are in a state of anxiety, uncertain whether they should expend more time and money in seeking to perfect title under the public land laws. Title to a large tract of highly valuable land is involved. The right of the State and county to collect taxes depends on the termination of the case, and, pending action by this court, the hands of the Secretary of the Interior are tied. For these reasons it is respectfully urged that the cause be set down for hearing at an early date.

Opposing counsel concur in this motion.

JOHN W. DAVIS,
Solicitor General.

MARCH, 1914.

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

FRANKLIN K. LANE, SECRETARY OF THE Interior, and Clay Tallman, Commissioner of the General Land Office, Appellants, *v.* CORNELIUS C. WATTS, DABNEY C. T. Davis, jr., John Watts, and James W. Vroom.	No. 889.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

This is an appeal from a decision of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court of the District, adjudging that title to certain land, known as Baca Float No. 3, situate in Arizona, selected by the heirs of one Luis Maria Cabeza de Baca, June 17, 1863, under an act of Congress June 21, 1860, passed out of the United States and vested in said heirs April 9, 1864; that thereafter the Land Department ceased to have jurisdiction thereover, except for the

purpose of surveying outboundaries in order to segregate the same from the public lands; that the appellees, or some of them, had shown sufficient title in themselves to the land to enable them to maintain the suit; and enjoining the appellants to place on file, as a muniment of title, a certain plat of survey and accompanying field notes, for the purpose of defining the said outboundaries and segregating the same from the public domain; and further enjoining appellants from proceeding in any manner in the matter of a certain homestead entry of land within the outboundaries of said tract or in the matter of any other alleged entries, or in any manner affecting said land, except to file the survey as aforesaid. (Record, pp. 309–310.)

STATEMENT OF THE CASE.

By the treaties of Guadalupe Hidalgo and Mesilla, Mexico ceded the territory embracing the present States of New Mexico and Arizona, the United States undertaking to deal with private-land titles precisely as Mexico would have done had there been no change in sovereignty. Among the land claimants were the heirs of Luis Maria Cabeza de Baca, to whom Mexico had granted land known as "Las Vegas Grandes." (Record, pp. 2–4.) Mexico had also generously granted the same land to the town of Las Vegas. Petitions for the confirmation of both grants were presented. The details are recited on page 4 of the record. The conflict resulted in the

passing of the act of June 21, 1860 (12 Stat., 71), which in the part (sec. 3) material here is as follows:

> That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the same tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number; and it shall be the duty of the surveyor general of New Mexico to make survey and location of the land so selected by the said heirs of Baca when thereunto required by them: *Provided, however*, That the right hereby granted shall continue in force for three years from the passage of this act, and no longer.

A survey disclosed that the Las Vegas grant embraced about 500,000 acres of land. Consequently each Baca Float, as they were called (five in all), consisted of about 100,000 acres. All of said "floats" have been located, and the Land Department has finally acted as to all by making and approving final surveys thereof, except the one known as Baca Float No. 3—the one here in controversy. This land is located in what is known as the Gadsden Purchase. The appellees claim to be successors to such title as the heirs of Luis Maria Cabeza de Baca had.

On December 11, 1908, appellees filed their bill in the Supreme Court of this District, averring, among other things, that on June 17, 1863, John S.

Watts, as agent or attorney for the heirs of Baca, in the manner prescribed by instructions given by the Commissioner of the General Land Office, July 26, 1860, to carry into effect the act of June 21, 1860, aforesaid (Record, p. 5), made application to the surveyor general of New Mexico for the land in controversy (Record, p. 6), a copy of which application the surveyor general forwarded to the Commissioner of the General Land Office on the same day with his certificate (Record, p. 7). The instructions of July 26, 1860, required the surveyor general and the register and receiver to certify that lands so selected by the heirs of Baca were vacant and nonmineral. June 18, 1863, the surveyor general wrote the commissioner his reason for not fully complying with the instructions (Record, p. 8), the reason being that the land selected was so far beyond any of the public surveys that, in the nature of the case, the register and receiver could not officially know anything about it; hence he deemed it unnecessary to procure their certificates.

Thereupon the Commissioner of the General Land Office, July 18, 1863, directed the surveyor general of New Mexico to comply with the instructions he had ignored by furnishing a statement from himself and the register and receiver that the land was vacant and nonmineral. (Record, p. 8.)

To this the surveyor general responded (Record, p. 9) under date of April 2, 1864, that there had been no public surveys in the neighborhood of the tract and

no record of or concerning this land in his office or, as he believed, in the office of the register and receiver; therefore—

> As I am personally unacquainted with that region of the country, I can not certify that the land in question is "vacant and not mineral," or otherwise. Those facts can only be determined by actual examination and survey.

This letter was written in Washington and was filed in the General Land Office April 4, 1864. (Record, p. 49.)

Under date of March 25, 1864, the register and receiver at Santa Fe signed two certificates to the effect that so far as their records showed the land was vacant and nonmineral. (Record, p. 9.)

It is contended by appellants that these certificates did not reach Washington until May 26, 1864. (See Record, pp. 162–163.)

Appellees, in the courts below, maintained that these certificates were before the Commissioner of the General Land Office on or before April 9, 1864.

On the last-mentioned date the commissioner wrote a letter to the surveyor general of *Arizona* (that Territory having been carved out of New Mexico prior to the date of application to the surveyor general of New Mexico, as will later appear) directing him to survey the described tract. (Record, pp. 9–11.) A correct certified copy of this document appears on pages 299–301, Record.

Appellees rest their case entirely upon this letter. It is claimed by them that this letter operated as an adjudication and as a conveyance of title out of the United States to the heirs of Baca. It is claimed by appellants, if the court is concerned with the merits, that the Secretary's decision of June 2, 1908 (Record, p. 281 *et seq.*), is correct and that the letter of April 9, 1864, was written merely in the light of, and pursuant to, the suggestion of Surveyor General Clark, April 2, 1864, that the facts he wished to know—character of the land—could only be determined by actual survey and examination in the field.

Plaintiffs in their bill then averred (Record, p. 11) that a survey pursuant to the letter of April 9, 1864, was attempted but no survey returned because the surveyors were killed by hostile Indians. This allegation was denied by defendants in their answer (Record, p. 35), and the plaintiffs, in oral argument, have admitted that they were mistaken in their allegation.

Plaintiffs next averred that though frequently requested and required by the heirs and representatives of the heirs of Baca, the Commissioner of the General Land Office from that time until about June 17, 1905, refused to have the survey made, but on that date did authorize and direct the surveyor general of Arizona to make said survey; that pursuant thereto such survey was made and that the plat and field notes, bearing date of November 23, 1906, were indorsed by the surveyor general and have been examined and found to be correct by the Commissioner

of the General Land Office. (Record, p. 11.) This allegation was denied (Record, p. 35) in so far as it averred that though frequently required, etc., the Commissioner of the General Land Office had "failed and refused to continue or have made the survey." The facts are as shown by appellants' Exhibits Nos. 47 and 48 (Record, pp. 249–253), namely, that survey at the instance and for the benefit of the Baca heirs, claimants, had been ordered, but that the claimants had failed to comply with the requirements of the order and that the survey, known as the Contzen survey, and being the survey of November 23, 1906, *supra*, was made for purely administrative purposes, i. e., in order that the lines might be definitely known and established, so that public lands in or about it might be disposed of without further delay.

This "Contzen survey" is appellees' "muniment of title"—as they claim.

On January 12, 1905, the Commissioner of the General Land Office, in ordering what resulted in the Contzen survey, directed that investigation of the character of the land be made as the survey progressed in the field, and held that the duty of determining what portions of the lands covered by the location were occupied or were known to be mineral on June 17, 1863, if any, devolved on him, the surveyor general, in the first instance at least. (Record, p. 12; for full text see p. 254.) The plaintiffs below then averred that, pursuant to said instructions, the surveyor general in December, 1906, in forwarding the Contzen survey, plats, and field notes included a

report recommending that the location of Baca Float No. 3 be entirely rejected. The text of the report appears on pages 255–266 of the record, and shows that the bases of this recommendation were that, at the time of application, part of the float was covered by conflicting grants (Calabasas, Tumacacori, and San Jose de Sonoita), and that the rest was known to be mineral in character.

Thereupon, May 13, 1907, the Commissioner of the General Land Office, passing upon this report, ordered that before a final conclusion should be expressed the claimants should be given an opportunity to submit evidence, if they so desired, and that a hearing before the surveyor general to determine whether said lands were, at the time of said location, vacant and non-mineral, after due notice, should be accorded. (Record, p. 12.) The text of this order appears on pages 278–280 of the record.

The appellees appealed from this order to the Secretary of the Interior, and were heard. On June 2, 1908, the Secretary, acting through the First Assistant Secretary, affirmed the action of the commissioner, but held that as to the Tumacacori, Calabasas, and San Jose conflicting claims the lands therein embraced were occupied lands at the date of application and in no event could pass to the claimants. (Record, p. 12.) The text of the decision constitutes defendants' Exhibit No. 52, and appears in full on pages 281 *et seq.* of the record. Whereupon motion for review was duly filed. Said

motion was overruled December 5, 1908. (Record, p. 12.)

The bill further avers (Record, p. 13) that one Henry Ohm made application to make homestead entry of a quarter section situate within the exterior limits of Float No. 3 and that on June 15, 1908, the Commissioner of the General Land Office instructed the register and receiver at Phoenix, Ariz., to allow Ohm to proceed with the making of final proof, but stated, however, that final action on such entry would not be taken until the "Baca Float decision had become final." (The text of the letter appears on p. 298 of the record.)

Plaintiffs below also averred (Record, p. 14) that there were other entries of land within Float No. 3 in the same status as the Ohm entry.

It was also averred that on May 1, 1864, the heirs of Baca conveyed Float No. 3 to John S. Watts, and that plaintiffs have succeeded to his title—the land now being worth more than $100,000.

Contending (Record, p. 12) that the letter of Commissioner Edmunds, dated April 9, 1864, ordering the survey of the tract vested, in fee, title to said tract in the heirs of Baca, and that the power of the Land Department over said land then and there ceased and determined, that the land had always thereafter been treated by said Land Department as segregated from the public domain not subject to any form of entry, and that the proceedings in the Ohm and other entries would cast a cloud upon

their title, the plaintiffs prayed that a writ of injunction issue commanding defendants to desist and refrain from further proceeding with the Ohm entry or in other matters affecting location No. 3; that they be compelled to file the Contzen survey and plat for future reference; that all lines, etc., on said plat, other than those contemplated by the letter of April 9, 1864, and particularly the lines showing the segregation of the alleged mineral portion, Tubac Township, and the conflicting portion of San Jose de Sonoita, Tumacacori, and Calabasas claims, be canceled and expunged; and for general relief.

To this bill defendants interposed a demurrer (Record, p. 17). The demurrer was overruled (Record, p. 29). The trial court rendered a lengthy opinion (Record, p. 19, *et seq.*), in which he went into the merits of the controversy and apparently was moved to his conclusion by assuming (p. 28) that the certificate of the register and receiver, dated March 25, 1864, were before the commissioner April 9, 1864, when order for survey issued.

Upon the overruling of the demurrer an answer was filed. (Record, p. 31, *et seq.*)

Some of the matters set forth in the answer have already been noted. There are, however, other pertinent points brought into the case.

It is averred (Record, pp. 38 and 39) that the Ohm entry is within the limits of the so-called Tumacacori claim, and that the other tentative entries, most, if not all, are within said claim, or the Calabazas or

Sonoita grant. Defendants showed that plaintiffs are not and never have been in possession of the land, but, on the contrary, from 1866 to 1899, were claiming title to other land. They showed (Record, pp. 47–48) that ~~on June 2, 1804~~ from Feb. 23, 1863, to July 2, 1864, the only surveyor general having jurisdiction over the land was not the surveyor general of New Mexico, who received and forwarded the application of the Baca heirs and who wrote the letter of April 2, 1864, but the surveyor general of Arizona, within which Territory the land is situate.

Moreover, it appears that in 1862 the heirs of Baca, through the same attorney, Judge Watts, selected entirely different lands in New Mexico, which selection was not only approved by the surveyor general, but was certified by him on belief as nonmineral and vacant. (Record, pp. 42–45.) The claimants were permitted to withdraw this selection (Record, pp. 46–47), and they then made the selection of June 17, 1863, covering the land in controversy. But on April 30, 1866, Watts practically withdrew this selection, under the guise of changing the initial point (Record, pp. 50–51), and was permitted so to do May 21, 1866 (Record, p. 22). No survey was made, because the claimants failed to deposit the cost of survey. (Record, pp. 53–55.)

From that date until 1899 the Baca claimants were claiming the 1866 location, which differs from the 1863 location, as shown by the map opposite page 178 of the record. The answer (Record, p. 56 *et*

seq.) shows that during this time efforts were made to secure legislation on the theory that Float No. 3 embraced land that the parties were inhibited from taking. The details are more suitably to be discussed in the argument. The answer shows why claimants were remitted to such rights as they might have in the 1863 location (decision dated July 25, 1899, Record, pp. 209–219) and that the department, in face of a report made by the surveyor general strongly suggesting that the land selected was known at the time of selection by the agents of the claimants to be that which the act of June 21, 1860, expressly said they might not take, has now merely called upon claimants to make such a showing as they desire on this point prior to final action by the department, and this although the parties had been duly notified at the time of the survey that inquiry as to the character of the land would be made as the survey progressed and that they might appear and offer evidence upon that point—a privilege they failed to exercise. (Record, p. 280.)

Replication was filed and issue joined. The plaintiffs introduced certain deeds showing conveyance by John S. Watts of the land as described in the selection of 1866, and from his grantee, through mesne conveyances, to two of the plaintiffs, C. C. Watts and Dabney C. T. Davis, jr., "trustees." The other plaintiffs, James W. Vroom and John Watts, claim title to the 1863 location under deeds from the heirs of John S. Watts, deceased, intestate. (Record, pp. 316–337.)

The defendants introduced exemplified copies of records of the Land Office, showing the status from time to time since 1863 to 1909, of the land in controversy and the claims and actions of the parties interested therein, as well as the attitude of the department in respect thereto.

On the record thus made the trial court decided in favor of the plaintiffs. The opinion appears on pages 301–310.

Briefly, the court said that the crux of the controversy (Record, p. 304) was whether or not title devested from the United States and vested in the heirs of Baca, or their assigns, April 9, 1864. If not, the court conceded that appellants had jurisdiction to consider the land as public land and to administer it as such. But, he decided (p. 309), title did pass out of the United States, and that defendants might be enjoined as prayed, with one single exception; he was not of the opinion that he could direct the making of an expurgated edition of the plat of the Contzen survey prior to filing; plaintiffs must be content with that plat as it is. The plat is opposite page 276 of the record.

From this decree an appeal was taken. The Court of Appeals affirmed the decree. (Record, pp. 341–352.)

The appellants say that under a proper construction of the act of June 21, 1860, title to the "float" can not pass until there has been an official survey and a final determination by the proper officers that

the land selected in 1863 was of the character which the statute permitted the heirs of Baca to take—a matter still *sub judice* in the department except as to the conflicting Tumacacori, Calabazas, and San Jose de Sonoita grants which the department has already decided were lands not vacant within the meaning of the act of 1860. (See departmental decisions of June 30, 1900, Record, p. 220 *et seq.;* of Mar. 5, 1901, Record, p. 230 *et seq.;* and of June 2, 1908, Record, p. 118 *et seq.*)

The Court of Appeals decided that title passed out of the United States in 1864 and that any claim of jurisdiction now by appellant to pass upon the character of the land amounts to an attempt to deprive appellees of their property without due process of law. (See Record, top of p. 351.)

The courts below have reviewed the various decisions of the Secretary of the Interior above referred to and have arrived at conclusions diametrically opposite on the material points, and that, in the absence of the United States, the owner of the legal title, if the Court of Appeals be wrong in its determination.

It is from this decision of the Court of Appeals that the appeal is taken.

ASSIGNMENT OF ERRORS.

We are convinced that—

1. The court erred in holding that the trial court had jurisdiction to determine title to land in another jurisdiction.

2. The court erred in assuming jurisdiction to determine title to land in another jurisdiction.

3. The court erred in not recognizing and holding that the suit involves the determination of the title to land claimed by the United States.

4. The court erred in not recognizing and holding that the suit is essentially one against the United States and that the United States is a necessary but absent party.

5. The court erred in assuming jurisdiction to determine the question of title presented in the face of the fact that the United States is a necessary party but has not been, and could not be, made a party because it has not in this behalf consented to be sued.

6. The court erred in holding that the trial court had jurisdiction to determine the question of title presented in the face of the fact that the United States is a necessary party, but has not been, and could not be, made a party because it has not in this behalf consented to be sued.

7. The court erred in failing to recognize and hold that the purpose and prayers of the bill are to interfere with and control the action of the officers of the Land Department in the exercise of their proper jurisdiction and discretion in the determination and disposition of questions and matters affecting the so-called Baca Float No. 3 coming before them for decision.

8. The court erred in holding that the trial court had jurisdiction to interfere with and control the discretion and judgment of the officers of the Land Department in the decision and disposition of questions and matters affecting the so-called Baca Float

No. 3 properly before them for determination and action.

9. The court erred in assuming jurisdiction to interfere with and control the discretion and judgment of the officers of the Land Department in the decision and disposition of questions and matters affecting the so-called Baca Float No. 3 properly before them for determination and action.

10. The court erred in not recognizing and holding that the question as to whether or not the legal title to the land embraced in the so-called Baca Float No. 3 has passed out of the United States was properly before the Land Department and involved the exercise of judgment and discretion by the officers of the Land Department in the determination thereof.

11. The court erred in not recognizing and holding that the determination of the question as to whether or not the legal title to the land embraced in the so-called Baca Float No. 3 had passed out of the United States involved the exercise of judgment and discretion by the officers of the Land Department in construing the act of June 21, 1860, and in passing upon the function and effect of the various proceedings had in respect of said Baca Float No. 3.

12. The court erred in not recognizing and holding that the ruling of the officers of the Land Department that under the act of June 21, 1860, the final act by which the legal title passes from the United States is the acceptance by the department and the filing of approved plat and field notes of a survey whereby the surveyor general makes location, as

vacant and nonmineral, of land selected by the heirs of Baca, involved the exercise of judgment and discretion and is not subject to review in direct proceedings of this character.

13. The court erred in not recognizing and holding that, in the performance of their proper administrative functions and duties, the officers of the Land Department were called on to exercise judgment and discretion in determining whether or not the area embraced in the so-called Baca Float No. 3 is still part of the public domain, and that their decision that it is, and their administration of it as such, can not be interfered with or controlled by the court in direct proceedings of this character.

14. The court erred in not recognizing and holding that, in the performance of their proper administrative functions and duties, the officers of the Land Department were called upon by the present claimants to determine whether or not the action taken by the Commissioner of the General Land Office on April 9, 1864, passed out of the United States the legal title to the so-called Baca Float No. 3, and that their decision that it did not involve the exercise of judgment and discretion and can not be interfered with by the court in direct proceedings of this nature.

15. The court erred in not recognizing and holding that, in the performance of their proper administrative functions, the officers of the Land Department were called upon to determine whether or not

the area embraced in the Sonoita and Calabazas and Tumacacori claims was reserved from selection by the Baca heirs, and that their decision that it was so reserved involved the exercise of judgment and discretion and can not be interfered with by the court in direct proceedings of this nature.

16. The court erred in not recognizing and holding that, in the performance of their proper administrative functions, the officers of the Land Department were called upon to determine whether or not the area embraced in Tubac Township was occupied and not vacant and therefore reserved from selection by the heirs of Baca, and that their decision that it was so reserved, involved the exercise of judgment and discretion, and can not be reviewed or interfered with by the court in direct proceedings of this nature.

17. The court erred in determining that legal title to the land involved passed out of the United States to the heirs of Baca on April 9, 1864.

18. The court erred in its construction of the act of Congress, approved June 21, 1860, in that it held that under said act legal title could, and did, pass prior to survey and filing of approved plat and field notes thereof.

19. The court erred in not holding that, under the act of June 21, 1860, it was necessary that the surveyor general, in the first instance, should determine the character of the land, as was held by the Supreme Court in *Shaw* v. *Kellogg* (170 U. S., 312).

20. The court erred in holding that the Commissioner of the General Land Office had authority, in

the absence of a determination of the character of the land by the proper surveyor general, himself to determine the character of the land, approve the selection, and pass title from the United States.

21. The court erred in holding that the surveyor general of New Mexico was the proper officer to act upon the selection in question.

22. The court erred in not holding that, at the time the selection was tendered and until after April 9, 1864, the surveyor general of Arizona was the proper officer to act upon the said selection and determine, in the first instance, the character of the land embraced therein.

23. The court erred in holding that the Commissioner of the General Land Office, by his letter directing survey, dated April 9, 1864, determined the character of the land, approved the location, and passed the title.

24. The court erred in holding that appellees have shown title, as successors in interest to the heirs of Baca, sufficient to enable them or any of them to maintain this suit, in this, that they failed to find and to hold that there was no proof that the parties recited in the deed from the so-called heirs of Baca to John S. Watts (plaintiff's Exhibit A. H., No. 1) were in fact the heirs of Baca, to whom the right to select land in lieu of the Las Vegas claim was granted; and in this, that they held, in effect, that said deed proved itself in the absence of any evidence that the grantors were the heirs of Baca and in the absence of possession and claim under said deed.

25. The court erred in holding that plaintiffs have shown title, as successors in interest to the heirs of Baca, sufficient to enable them, or any of them, to maintain this suit.

26. The court erred in not holding that the Tumacacori, Calabazas, and San Jose de Sonoita grants, Mexican or Spanish grants, so far as they conflict Baca Float selection No. 3, *pro tanto* defeated said selection.

27. The court erred in not holding that under the act of July 22, 1854, no affirmative action on the part of those claiming under alleged Spanish or Mexican grants was required in order to place the lands covered by said claims in reservation from other appropriation as a part of the public domain.

28. The court erred in sustaining the trial court in enjoining the appellants from further action upon the Ohm and other homestead and mineral entries pursuant to the ruling of the officers of the Land Department that the land embraced therein, being within the Calabezas and Tumacacori claims, was not vacant land at the date of application for the so-called Baca Float No. 3, and not appropriated thereby, and is now public land subject to entry.

29. The court erred in sustaining the trial court in enjoining the appellants to file the plat and field notes of the Contzen survey in the face of the fact that the officers of the Land Department, in the exercise of their proper judgment and discretion, have decided, and now contend, that in view of the report of the surveyor general that the

land in question at the time of application for the so-called Baca Float No. 3 was not vacant and non-mineral within the meaning of the act of June 21, 1860, such plat and field notes should not be approved.

30. The court erred in not reversing the action of the trial court and directing the dismissal of the bill.

POINTS OF ARGUMENT.

The real purpose of this suit is to secure from the court a decision contrary to the conclusion reached by the Land Department when the case was regularly before it; a decision to the effect that legal title to the land in controversy passed out of the United States in 1864 and that these appellees, or some of them, are the present owners of that title.

And in this, through what we conceive to be error on the part of the courts below, plaintiffs succeeded. For the courts went into the merits of the case, precisely as the appellants did when it was before them, traversed essentially the same ground, and arrived at a conclusion in reversal of the decision of the Land Department. The court's opinion, with the decree that resulted, is in every respect a review of a decision involving a question of public lands, precisely as if the parties were entitled to an appeal. Appellees had litigated their case before the department; had appealed from the judgment and order of the Commissioner of the General Land Office to the appellate tribunal in public land matters, the Secretary of the Interior, and within the rules had filed a motion for

reconsideration; and then, upon defeat, immediately transferred the whole case to the Supreme Court of the District and there reargued and resubmitted the same contentions they had advanced in the Land Department. This direct procedure necessarily involved either of two things—

(1) A direct review, in the nature of a consideration of the case as if it were on appeal (if that were permissible) from the departmental decision of June 2, 1908 (36 L. D., 455), or (2) a trial of title to land not situate within this jurisdiction, wherein an essential party is not present in the forum and is not even suable—the United States.

Manifestly, legal title, aside from the tract covered by the confirmed San Jose de Sonoita grant, is in either the United States or in some grantee of the United States—possibly these appellees (although the evidence does not competently show that the heirs of Baca ever conveyed their suppositive title).

In no event is title in the appellants.

The test is the effect of the judgment or decree which can be entered. (*Oregon* v. *Hitchcock*, 202 U. S., 60.)

While, fundamentally, a question of jurisdiction arises and precedes all other questions and, in our opinion, concludes the matter, a discussion of the merits of the controversy as it has been presented to the department may be more apposite at this point; following, as it does, the statement of the case. And undoubtedly a consideration of the case on its

merits will render all the more clearly apparent the incontestibility of the point made as to jurisdiction.

THE MERITS OF THE CASE.

The act of June 21, 1860, did not specify in what manner or by what instrument title was to be conveyed after the heirs of Baca had made the five several selections. In one or two instances, in late years, the Government has issued patents; but for a generation the view entertained by the department was that all that was necessary was the acceptance and filing of an approved plat of survey with the associated field notes, whereby the surveyor general made "location" of the selection of land affirmatively shown to have been vacant and nonmineral so far as was known at the date of selection. The instructions of July 26, 1860 (Record, p. 6), expressly directed that "the final conditions" must be a statement from the surveyor general and the register and receiver that the land was vacant and nonmineral. In other words, the commissioner, before passing title, must have some evidence that the land selected was of the character described in the act.

In support of the proposition that title has passed out of the United States, the appellees contended, when they were before the department:

> 1. That the grant made by the act of June 21, 1860, was completely effectuated when the selection was made and notified to the surveyor general; or
>
> 2. That, if the above be not the last act required, the approval of the surveyor general

vested the legal title in the claimants; or, finally, if more is required by the implied terms of the act,

3. That the action of the Commissioner of the General Land Office, on April 9, 1864, was an adjudication of the title in the grantees.

These quotations appear in Exhibit 52, on page 282 of the record.

The department decided (Record, p. 118, at middle of p. 136)—

> that the final act by which title passes under the grant of June 21, 1860, is the acceptance by the department and the filing of approved plat and field notes of a survey whereby the surveyor general made location of the selection of lands affirmatively shown to have been vacant and nonmineral at the date of application, so far as was then known by the selectors.

The ruling was fair to the claimants and to the United States. The heirs of Baca were not privileged to take land when and where they pleased and regardless of its character. They were limited to land within the confines of New Mexico (which then embraced Arizona and Colorado) and of a character special only in so far as it must be vacant, unoccupied, and nonmineral. This court has said in *Shaw* v. *Kellogg* (170 U. S., 312), involving Baca Float No. 4 (located in Colorado):

> They were not at liberty to select lands already occupied by others. The land must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. Congress did not intend to grant any

> mines or mineral lands, but with these exceptions their right of selection was co-extensive with the limits of New Mexico.

Elsewhere, in the same decision, this court said:

> How was the character of the land to be determined, and by whom? The surveyor general of New Mexico was directed to make survey and location of the lands selected. Upon that particular officer was cast the specific duty of seeing that the lands selected were such as the Baca heirs were entitled to select.

He, however, was subject to the control and direction of the Land Department and could not act defiantly or independently, but—

> he was the particular officer charged with the duty of making survey and location, and it was for him to say, in the first instance at least, whether the lands so selected, *and by him surveyed and located*, were lands vacant and nonmineral.

The departmental decisions have been wholly in harmony with this ruling. It has consistently taken the position that the claimants can not acquire title until after it has been determined whether the land selected by the grantees was vacant and nonmineral and that the grant being one of quantity—a mere "float"—that an official survey is essential to segregate it from the public domain; that such is the function of the proper surveyor general in the first instance, his action being subject to review in the Land Department; that this ascertainment of character and

the survey constitute that "location" which the act of June 21, 1860, directed to be made by the surveyor general; and that legal title passes only upon approval by the Land Department of that ascertainment of character and the survey. The final act in this case has never been performed by the Land Department, and in this case, the actual ascertainment of the character of the land was adverse to the claimants.

Title could not pass upon the mere selection of land by the heirs of Baca, as contended by appellees in their first proposition, because, if that were so, their right of selection of Float No. 3 was exhausted in 1862. For, on October 30, 1862, Watts, the agent of the Baca heirs, selected land at Bosque Redondo, N. Mex., as the location of No. 3. (Record, pp. 12–17.) Clark, the surveyor general, certified that the land was vacant and nonmineral, and the register and receiver at Santa Fe furnished the certificate of character called for the instructions issued by the Commissioner of the General Land Office. Now if the act of selection, or, if not that, the act of the surveyor general, even if he had not yet surveyed the land, as contended in the appellees' second proposition, fulfills all the requirements of the act of 1860, in vesting the legal title to the land selected in the grantees, then it follows that the rights of the heirs were exhausted in 1862, and that all subsequently happening in 1863 and later amounts to naught.

But Watts, January 18, 1863, asked permission to withdraw that location "*as no survey or confirmation of the location has yet been made.*"

All parties acquiesce in the proposition that the heirs took nothing at Bosque Redondo. They had no such title as required reconveyance. They merely withdrew, with permission, that selection.

On June 17, 1863, Watts tendered the second selection of Float No. 3 (Record, p. 6)—the land involved in this litigation. Clark, the same surveyor general who had acted upon the Bosque Redondo selection, certified that the selection embraced the proper acreage and that it, with the other selected floats, constituted four-fifths of the Baca claim, concluding with the expression, which must have referred merely to the related facts, "Said location is hereby approved."

This was not an adjudication as to character of the land and can not be taken as an approval of the selection so far as character of land was concerned; because June 18, 1863, in forwarding the selection and his certificate to the Land Department, he wrote (Record, p. 8):

> As this location is far beyond any of the public surveys, I have not deemed it necessary to procure any certificate from the register and receiver of the land office, as from the nature of the case, they can not officially know anything concerning it.

Title could not pass at this point. There was not a scrap of evidence as to the character of the land. It might have been full of mines and partly settled, so far as the papers transmitted to Washington then showed. In the Bosque Redondo case, the local land

officers, as well as Clark, had furnished certificates as to the character of the land. But in the June, 1863, selection no one vouched for the character of the land save Watts, the selector. And it will hardly be pretended that the act of 1860 left it to the selectors to determine whether the land selected was vacant and nonmineral. Even upon the hypothesis apparently assumed by plaintiffs that selector could determine the nonmineral and vacant character of the land, it affirmatively appears from this record that Watts himself was wholly without information upon the subject.

His communication of June 17, 1863, wherein he tendered the selection here in controversy, is wholly negative. He says "said tract of land is entirely vacant, unclaimed by anyone, and is not mineral to my knowledge." He affirms these things but (by an *absque hoc*), admits he knows nothing about it. (Rec., 7.)

Turning to page 50 of the record, wherein is set out Watts's letter of April 30, 1866, to the Commissioner of the General Land Office, asking that he be allowed to change the initial point (and as elsewhere pointed out this works practically an entire substitution of new land), he affirmatively states with reference to the selection of June 17, 1863.

> You will find, by reference to the papers in your office, that on the 17th of June, 1863, I filed with the surveyor general of New Mexico an application for the location of one of the five locations confirmed to the heirs of Luis

Maria Cabaza de Baca under the tenth section of the act of Congress approved June 21, 1860. I further state that the existence of war in that part of the Territory of Arizona and the hostility of the Indians prevented a personal examination of the locality prior to the location, and not having a clear idea as to the direction of the different points of the compass, when the subsequent examination of the location was being made by Mr. Wrightson, in order to have the location surveyed, it was found that the mistake made would result in leaving out most of the land designed or intended to be included in said location.

* * * * *

I beg leave further to state that this land, which will be embraced in this change of the initial point, is of the same character of unsurveyed vacant public land as that which would have been set apart by the location as first solicited, *but is not the land intended to have been covered by said location*, but the land to be included within the boundaries above designated is the land that was intended to be located and was believed to have been located upon until preparations were made to survey said location.

Mr. Watts therefore most solemnly avers two things, viz, that he did not know or have the means of knowing the character of the tract here involved as to occupancy or minerals, and that the land to which the alleged successors in interest of Baca now claim title was not the land they wanted or were trying to have surveyed and confirmed to them.

The letter of J. H. Watts of August 15, 1877, which appears at pages 56 and 57 of the record is also illuminating in this connection.

Clark's letter of June 18, 1863, arrived in Washington July 13, 1863. (Record, p. 159.) July 18, 1863 (Record, p. 160), the commissioner wrote Clark that his approval had "ignored the imperative condition that the land selected" was vacant and nonmineral land.

> Before the application of Location No. 3 of the heirs aforesaid can be approved by this office, it is necessary that our instructions of the 26th July, 1860, should be complied with by furnishing a statement from yourself and the register and receiver that the land thus selected and embracing one-fifth of this claim or 99.289–39/100 acres is vacant and not mineral.

In other words, no further steps could be taken at Washington in the absence of evidence that the selected land was such as the heirs of Baca might take.

Nothing further occurred until 1864, when Clark came to Washington, and April 2, 1864, answered the commissioner's letter. (Record, p. 161.) After stating that there had been no public surveys in the neighborhood of the tract and no record concerning the land in his office, nor in the Santa Fe land office, he said:

> As I am personally unacquainted with that region of country, I can not certify that the land in question is "vacant and not

> mineral," or otherwise. Those facts can only be determined by actual examination and survey.

On April 9, 1864, the commissioner ordered a survey of the land. (Record, p. 9 *et seq.*) That survey was never made for reasons that will appear.

The case from appellees' point of view hangs upon the effect of this letter. They say that it operated to pass title from the United States and that it has foreclosed all subsequent action by the department in ascertaining the known character of the land or in doing aught save to perform acts for their benefit, such as affording them a muniment of title.

The appellants say that the commissioner merely took Clark at his word and ordered a survey that might bring into the case the evidence that was lacking; so that when he had a plat of survey and the field notes before him he could definitely and finally act, approving and filing as a muniment of title if all were right or rejecting if it were otherwise. That it was not a final act passing title either in his view or in that of Judge Watts, the attorney of the Baca heirs, is abundantly demonstrated by what subsequently occurred.

The commissioner had absolutely no evidence before him April 9, 1864, touching the character or status of the land. He had merely the surveyor general's inability and express refusal to certify. Nor did he in ordering survey waive or abate his demand for certification. His letter of July 18, 1863, was still in force. Before he could approve the

selection he must have evidence as to the character of the land. On this point the departmental decision of March 5, 1901 (Record, p. 230, at p. 234), fully states the situation.

It has been claimed, however, by the appellees that he did have evidence before him on April 9, 1864. The record, the facts in the case, so clearly demonstrate this not to be so that the contention might well be ignored, leaving the record to speak for itself in its appeal to the common sense of the bench, were it not for the singular, the extraordinary, obsessions of the lower courts on this point.

On March 25, 1864, at Santa Fe, N. Mex., the register and receiver gave Judge Watts their certificate that the land was vacant and not mineral, so far as their records showed. (Record, p. 9.) This was a peculiar sort of certificate, without evidential value, for the simple reason that the records showed nothing, one way or the other. March 27, 1864 (Record, p. 19), Watts inclosed these certificates to W. Wrightson, who was interested with him in the float (see Record, p. 61), expressing the hope that the certificates would enable him "to get the location confirmed." It is not shown where Wrightson was. Watts mailed the letter at Santa Fe. Probably Wrightson was not in Washington, for the letter and the inclosed certificates did not reach the General Land Office at Washington until *May 26, 1864*. (See Exhibit No. 13, Record, pp. 162–163: "Received at the Gen. Land Office, Washington, D. C., May 26, 1864.

John S. Watts, Santa Fe, N. Mex., March 27/64. Encloses a Certificate of the Regr. at Santa Fe, N. Mex., to a location No. 3 for the heirs of Luis Maria Cabeza de Baca in Arizona. M. Hawes. File with the case, Hawes.") Had the letter been mailed directly to Washington from Santa Fe, it could not have arrived at its destination in less than 19 days from mailing.

In oral argument during the trial of the case, we asked the court judicially to notice that in 1864 a letter written at Santa Fe, on March 27, 1864, could not have reached Washington on or before April 9, 1864—a matter of 13 days; meaning, of course, that these certificates could not have been factors in actuating the commissioner in whatever he intended to do by his letter of April 9, 1864, ordering the survey. Counsel for appellees, on the other hand, asked the court judicially to notice the contrary; that fast pony-express connections with railroads would enable a letter to reach Washington before April 9, 1864. They urged this although they were already in possession of a report from the Post Office Department on the matter. This report appears on page 144 of the record. It was placed in the file of the case by the trial judge to whom it was furnished by appellants after the arguments in the case. This report shows that it required 19 days to transmit a letter from Santa Fe to Washington. Monday was mailing day at Santa Fe. The first Monday after March 27, 1864, was March 28. For 15 days the letter would have

been en route across the plains, had it been sent directly to Washington, ere it could have reached railroad connections at Kansas City. The letter was due at Kansas City, April 12; at Washington, four days later; all after April 9. Attention is called to Clark's letter of June 18, 1863, inclosing the selection of June 17, 1863—already mentioned; that letter was mailed June 22, 1863, and was received at Washington July 13, 1863—a matter of 21 days. (Record, p. 159.)

But as a matter of fact, as heretofore shown, the certificates of the register and receiver did not reach the General Land Office until May 26, 1864—47 days after the commissioner had ordered survey of the land.

The trial judge, when he passed upon this case on demurrer, assumed that the commissioner had these certificates when he wrote the letter of April 9. (See fourth paragraph, p. 27 of Record.) On final hearing the same judge, with the evidence before him, remarked that there had been some contention as to whether these statements were in the hands of the commissioner on April 9. But in disposing of the contention (Record, top of p. 308) he contented himself with the observation that "if not in the hands of the commissioner, however, they were evidently on the way to him."

It is, of course, agreed that they were "evidently on the way to him;" but we fail to understand the relevancy of that fact unless it means that by some clairvoyant process the commissioner's gaze April 9,

1864, penetrated space and enabled him to read the certificates in a mail bag thousands of miles away.

The Court of Appeals, in passing this point, escaped Scilla, but foundered on Charybdis. It seems that on the margin of Clark's letter of April 2, 1864, to the commissioner, wherein he declined to certify as to the character of the land, stating that the facts could be ascertained only upon actual examination, some clerk had written in blue pencil "See letter fr. Hon. Watts of March 27, 1864, inclosing R. & R. certificates." There is nothing to show when the notation was made—whether in 1864, 1874, or 1904. The case, and the papers in the case, have been handled thousands of times in the 50 years that the matter has been in controversy. One thing is certain, however: The filing on the original letter inclosing the certificates, as already remarked, shows that the certificates were not received in the General Land Office until May 26, 1864. Hawes, a clerk who made the filing, noted "File with the case." The clerk who complied with this direction may have made the blue pencil notation on Clark's letter to connect the two. Or it may have been made later. It could not have been made before unless the clerk with the blue pencil was another clairvoyant.

But the Court of Appeals in its decision (Record, p. 341, at middle of p. 349), casting aside the clairvoyant theory said:

> Giving to this notation the effect to which it is now entitled, and indulging in the infer-

> ences naturally deducible therefrom, we must assume that when the communication of April 9th was sent forth by the commissioner he knew of the views entertained by the register and receiver concerning the character of this land, and that he considered those views and the other evidence before him sufficient, in the circumstances of the case, to justify him in approving the location.

So it was telepathy, or some brand of thought-transference, and not clairvoyance, that enabled the land-office Daniel to come to judgment!

We submit that the excerpt contains error in English, in that it should read "supernaturally deducible;" error of fact, in that it speaks of "other evidence" when there was none, and in stating that the commissioner approved the location when in terms he did not; and error of law, in inferring that he approved the location, if the expression were not intended as a finding of fact.

No one 50 years ago attached the importance to the letter of April 9, 1864, that it has lately acquired. The letter passed into the hands of Judge Watts. It was addressed to Levi Bashford, surveyor general of Arizona. Arizona had been set apart from New Mexico by the act of February 24, 1863 (12 Stat., 664), the second section of which provides as follows:

> That the Government hereby authorized shall consist of an executive, legislative, and judicial power. The executive power shall be vested in a governor. The legislative power shall consist of a council of nine members, and

a house of representatives of eighteen. The judicial power shall be vested in a supreme court, to consist of three judges, and such inferior courts as the legislative council may by law prescribe; there shall also be a secretary, a marshal, a district attorney, and a surveyor general for said Territory, who, together with the governor and judges of the supreme court, shall be appointed by the President, by and with the advice and consent of the Senate, and the term of office for each, the manner of their appointment, and the powers, duties, and the compensation of the governor, legislative assembly, judges of the supreme court, secretary, marshal, district attorney, and surveyor general aforesaid, with their clerks, draughtsman, deputies, and sergeant at arms, shall be such as are conferred upon the same officers by the act organizing the Territorial government of New Mexico, which subordinate officers shall be appointed in the same manner, and not exceed in number those created by said act; and acts amendatory thereto, together with all legislative enactments of the Territory of New Mexico not inconsistent with the provisions of this act, are hereby extended to and continued in force in the said Territory of Arizona until repealed or amended by future legislation: *Provided*, That no salary shall be due or paid the officers created by this act until they have entered upon the duties of their respective offices within the said Territory.

Thus it will be seen that the surveyor general of New Mexico became *functus officio* as to all matters

within the newly created territory upon the approval of the act.

Bashford qualified as surveyor general of the new territory in June, 1863, prior to the selection of Float No. 3. (Record, p. 18.) Clark had no jurisdiction over the land at any part of the time between February 24, 1863, and July 2, 1864, when the office of surveyor general of Arizona was abolished and his duties were transferred to the surveyor general of New Mexico. Whatever was done in respect to Baca Float No. 4 was done by the surveyor general of Colorado and not by the surveyor general of New Mexico. (*Shaw* v. *Kellogg*, supra.)

The instructions of April 9, 1864, were returned to the General Land Office on May 21, 1866 (Record, p. 32). Prior to that date, Judge Watts, who was Delegate in Congress from New Mexico, wrote the commissioner, under date of April 30, 1866 (Record, p. 20), asking permission to change the initial point of the selection of 1863 because he had discovered that the description given did not embrace land that it was intended to take. March 21, 1866, the commissioner instructed Clark to cause survey to be made according to the amended description, "provided by so doing the outboundaries of the grant thus surveyed will embrace vacant lands not mineral." Watts neglected to make a deposit for the cost of survey, and no survey was made. (Record, pp. 23–25.) But from this time on, until 1899, the 1863 location was ignored and the 1866 location was the one known as Baca Float No. 3. It was virtually a

new location. If the court will look at the map opposite page 178 of the record, it will see the approximate positions of the 1866 and the 1863 locations. The 1863 location is outlined in green; the 1866 location in orange. The two are as badly divided as Ulster and the rest of Ireland. They overlap only as to a small portion in the northeast corner—the part shown as the "mineral segregation" on the plat opposite page 276 of the record.

Now if the instructions of April 9, 1864, were intended to operate as an approval and as a conveyance, how could the commissioner and Judge Watts get together and by mere exchange of letters and by return of the instructions of 1864, reinvest the United States with title? No such thing was dreamed of. It was the affair of the 1862 location repeated. If what was done respecting the Bosque Redondo selection was lawfully done, why could not the same thing be done in respect to the 1863 location? And if it were unlawful to do in 1866, why was it not equally unlawful to do the same thing in 1862–3? There is but one substantial difference—the one pointed out in the departmental decision of July 25, 1899. (Record, p. 209, *et seq.*) The act of 1860 limited the period of selection to three years from June 21, 1860. The 1866 selection was a relocation made after the expiration of the period. Were it not for that fact, the 1866 location and not the 1863 location would constitute the land at present in controversy. The title deeds of two af the appellees,

C. C. Watts and Mr. Davis, describe the 1866 location. (Record, p. 322, *et seq.*)

The heirs of Baca, it is claimed, deeded their interest to Watts May 1, 1864. (Record, p. 316.) If there were such a deed, that deed describes the 1863 location. Two of the appellees, John Watts and Mr. Vroom, claim title from the heirs of Watts, who died intestate. (Record, p. 336.) One of their grantors is J. Howe Watts, son of Judge Watts. He is the J. H. Watts who petitioned the commissioner August 15, 1877, for the right to relocate No. 3 (Record, p. 56). He stated that "we" (the heirs of Watts) "now suppose its location to be on mineral lands." He stated that he understood that the location had been disapproved on account of its being mineral or "for absence of proof that it was not mineral." The commissioner corrected his error (Record, pp. 57–58), stating that while there had been correspondence relative to whether the land was nonmineral, the location had not been disapproved but had been ordered surveyed according to the amended application of April 30, 1866. That statement in part is true to-day: The department has never disapproved the selection of 1863 *in toto*, but is, and has been, endeavoring to secure complete information to the end that the selection may be finally approved or disapproved.

In the same year, one Poston, as assignee of the heirs of Baca, likewise requested permission to relocate because the location of Float No. 3 embraced occupied and mineral lands. (Record, pp. 29–31.)

In the early eighties the then claimant of the float memorialized Congress for permission to relocate and, later, sought public land scrip in lieu of the float, the bills in Congress reciting that Float No. 3 had "not yet been located." (Record, p. 32.)

From this time to 1899, claimants were before the department either in efforts to secure relocation or in presenting some phase of the case. The departmental decisions of June 30, 1900 (Record, p. 220); March 5, 1901 (Record, p. 230), and April 16, 1902 (Record, p. 245) describe the progress of the case prior to the survey of 1905.

"Tell me what the parties have done under a deed and I will tell you what the deed means."

It is well settled that "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he can not, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

> *O. & M. Ry. Co.* v. *McCarthy* (96 U. S., 258); *Snyder* v. *Mystic Circle* (122 S. W., 985–6); *Goodman* v. *Purnell* (187 Fed., 93–94); *Taenzer & Co.* v. *C. R. I. & P. Ry. Co.* (191 Fed., 551).

The claimants of the float at all times neglecting to make deposit of the cost of survey, it became necessary for the Land Department to ascertain the outboundaries of the claim. While various alleged successors to the Baca interests were claiming the

1866 location, or were endeavoring to relocate the float, the land within the 1863 location was regarded and treated by everybody as a part of the public domain, except such portions as were covered by certain Mexican grant claims. Lines of public survey had been extended within its outboundaries as early as 1878 and entries under the public land laws were made—the first as early as November 14, 1878. (Record, pp. 85–90.) On May 31, 1898, this court decided, *Faxon* v. *United States* (171 U. S., 244), that the Tumacacori and Calabazas grants were invalid. The location of these claims, so far as they conflict with the 1863 selection, is shown by the map opposite page 276 of the Record. Immediately following this decision of the Supreme Court, and prior to the departmental decision of July 25, 1899, remitting the Baca claimants to such rights as they might have in the 1863 selection, a host of homesteaders made entries within the Tumacacori and Calabazas lines. The San Jose claim in the east part of the float had already been confirmed as to one and three-fourths sitios by this court. (*Ely's Admr.* v. *United States*, 171 U. S., 220.)

The decision of July 25, 1899, made it imperative to establish with exactness the lines demarcating Float No. 3, as applied for under the selection of June 17, 1863. So, on November 10, 1904, the commissioner of the General Land Office (Record, p. 250) wrote the Secretary calling his attention to the selection, saying:

For the purpose of administering the public-land laws and in order that applicants under said laws may be forced to no unnecessary trouble, expense, or delay in perfecting titles to which they believe they have a right under the general land laws, the exterior boundaries of Baca Float No. 3 should in my opinion be surveyed and connections of the same made with the other grants in conflict therewith, whether the latter be confirmed or finally rejected.

While the office diagram mentioned above clearly shows what sections and portions thereof of the public lands which when surveyed will be covered by the said float, it must be remembered that this diagram can not be relied upon except to show merely the approximate or supposed location of the float, and it is certain that the lines of survey when actually run in the field will not coincide exactly with the lines as laid down on the aforesaid diagram.

In view of the foregoing and for the purposes of enabling this office to properly administer the laws relating to the disposition of the public lands, I would respectfully request that authority be granted for the survey of said exterior boundaries of Baca Float No. 3 and the correction of said exterior boundary lines with such private land grants as conflict therewith.

The necessary authority was granted by the Secretary December 28, 1904. (Record, p. 252.) Instructions were given to the surveyor general Jan-

uary 12, 1905. (Record, p. 254.) He was told that it devolved upon him, in the first instance at least, to investigate and determine the character of the land. The survey, known as the Contzen survey, was made in 1905.

It was not the survey ordered in 1864 for the benefit of the claimants. It was a Government survey made for administrative purposes. Yet it would serve the purpose of segregating the float, tying it to the land, and enabling the department to convey to the claimants full title if the land were of such character as the granting act authorized the heirs of Baca to select.

But the surveyor general, November 5, 1906 (Record, p. 255, *et seq.*), after taking testimony with notice to the claimants, who failed to appear, reported adversely, saying that the land was known mineral or occupied land at the time of selection and recommended that the entire float be rejected.

It was not summarily rejected. Notwithstanding the fact that the investigation had been conducted with notice to the appellees, the department decided that before taking final action it would accord the claimants a hearing if they so desired.

But the claimants contended that the department was without authority now to determine the character because title had passed out of the United States by operation of the letter of April 9, 1864.

So the Secretary was forced to construe the act of June 21, 1860, and decide when, at what point, by

what circumstance, title did pass, or whether it had passed at all.

He decided that the final act by which title passes under the grant of June 21, 1860, is the acceptance by the department and the filing of the approved plat and field notes of a survey whereby a surveyor general made location of the selection of lands, reporting them as vacant and nonmineral at the date of selection. And in this conclusion he was supported by the Supreme Court of the United States in *Shaw* v. *Kellogg* (170 U. S., 312).

In that case selection was made in 1862, was filed in the office of the surveyor general of New Mexico, who forwarded a copy to Washington and *to the surveyor general of Colorado*, where the land was situate, just as in the case at bar we maintain that the application of June 17, 1863, should have been sent to Bashford, surveyor general of Arizona, where the land was situate, for his action. In *Shaw* v. *Kellogg*, all the action required of a surveyor general was performed, not by the surveyor general of New Mexico but by the surveyor general of Colorado. The latter, February 24, 1863, wrote the commissioner that he supposed this was a certain location made by ex-Gov. Gilpin, designed to cover rich mineral lands. The surveyor general was promptly advised that before the application could be approved "by this office," certificates from him and the register and receiver must be furnished showing that the land was vacant and nonmineral. The surveyor general,

at Gilpin's request, contracted with a deputy to survey the land. November 2, 1863, the contract was disapproved and he was again notified that he must furnish the certificates required. So in December, 1863, he and the local officers furnished certificates. It seems that Sheldon, the deputy surveyor, had gone ahead and had made a survey in November, 1863. The certificates related to the land so surveyed. They were not accepted as sufficient. But in February, 1864, the commissioner reconsidered the matter and directed the surveyor general to file the original field notes, duly verified and authenticated, subject them "to the usual satisfactory tests," and if regular and correct *to approve the survey*. He was also told—and this was what the commissioner had no power to compel, as the court held—to make his approval subject to certain conditions. The field notes were thus approved by the surveyor general and were forwarded to the General Land Office in March, 1864.

Bear in mind the dates—*1864*, although the certificates of character were furnished in December, *1863*.

The court said:

> How was the character of the land to be determined, and by whom? The surveyor general of New Mexico was directed to make survey and location of the lands selected. Upon that particular officer was cast the specific duty of seeing that the lands selected were such as the Baca heirs were entitled to select. * * * We do not mean that Congress thereby created an independent tribunal outside of

> and apart from the General Land Department of the Government. On the contrary, the act of 1854 provided that he should act under instructions from the Secretary of the Interior, and so undoubtedly in proceeding to make survey and location as required by section 6 of the act of 1860, he was still subject to the control and direction of the Land Department; but while he was not authorized by this section to act in defiance or independently of the Land Department, he was the particular officer charged with the duty of making survey and location, and it was for him to say, *in the first instance at least*, whether the lands so selected, and *by him surveyed and located*, were lands vacant and nonmineral. This is in accord with the views of the Land Department, as appears from the official letter of June 28, 1884, * * * "You will see by the foregoing that the land in question was determined *in 1864* by the surveyor general—whose province and duty it was—to be nonmineral; the location was then perfected and the title passed."

It was not what was done in *1863* that passed title, but what was done in *1864*, when the surveyor general decided "in the first instance" that the land "*by him surveyed and located*" was vacant and nonmineral. His judgment, thus rendered in the first instance, was ratified by the Land Office by accepting and filing his approved plat and field notes. "The location was then perfected and the title passed."

With this as a guide and with the facts before him, the Secretary was right in his conclusion. What were

the facts April 9, 1864, when survey was ordered in Baca Float No. 3?

An application for the land had been filed, had been approved as in form by a surveyor general (although he was not the surveyor general having jurisdiction over the land). In July, 1863, he was notified, just as the surveyor general of Colorado was in 1863, that he must furnish certificates by himself and the register and receiver. In the Colorado case, the officers furnished certificates in December, 1863, which the commissioner did not deem sufficient. But in Baca Float No. 3, the surveyor general flatly declined to certify that the land was vacant and nonmineral. This was on April 2, 1864. He said: "*Those facts can only be determined by actual examination and survey.*"

That letter was before the commissioner April 9; that is conceded. And it was all that was before him. Would the commissioner who had recently refused to accept the certificates of the surveyor general of Colorado, accompanied by the certificates of the register and receiver, as sufficient, purposely approve and deliberately undertake to pass title out of the United States in a case where he not only had no evidence, but where he had the refusal of the surveyor general to certify and the latter's recommendation that the only way these facts can be determined is by actual examination and survey?

The subsequent history has been fully described in this brief—the efforts to relocate, the efforts to secure

legislation, and the final remitting of the claimants to such rights as they might have in the 1863 location.

And this was an act of grace. The department might easily, and with justification, have held that the 1863 location was abandoned by the claimants and have refused to permit title to that tract to become a matter of controversy. In 1866 claimants stated that they had made a mistake in selection and that the land described was not what was intended to be taken. They returned the order of survey of April 9, 1864, the letter now apotheosized as the magic instrument by which title passed. They withdrew that selection just as effectively as they did the selection of 1862 at Bosque Redondo. Parties have acted upon it: The claimants themselves, the grantors in the various conveyances describing the 1866 location, the Government, and the public who had initiated homestead settlements and in some instances had acquired title. The Land Department might very justly have held in 1899 that the relocation of 1866 was without warrant of law, and that the claimants were estopped then to assert claim to the 1863 location.

In 1905 a survey was had, and for the first time a surveyor general passed upon the question of character of the land. As already shown, the department has not yet finally acted with reference to his report.

A survey was necessary to segregate from the public domain the land attempted to be selected. Until this

was done and the survey duly approved, title could not pass.

This is not a case where a person has a claim under a foreign grant, identified by bounds or some description, of which he is in possession and title to which has been confirmed—the subsequent survey and patent merely affording a muniment of title.

We are dealing with a grant from the United States of a mere right to select an acreage. In such cases the legal title never passes until official survey identifying and segregating the land from the public domain.

The distinction is observed in *Joplin* v. *Chachere* (192 U. S., 94), distinguishing *Gibson* v. *Chouteau* (13 Wall., 92).

A definite act must be taken by the Government; not merely ordering a survey, but making and approving a survey by which the selected tract is segregated, and by which the float is officially located.

That act has not yet been taken, except so far as the survey of 1905 affords the means by which the tract may be carved out of the residue of the public domain; and there yet remains for decision whether or not the land thus surveyed is of the character that under the granting act the heirs of Baca were permitted to take. If doubts raised by the surveyor general be resolved in favor of the claimants, title may be passed by the only tribunal under the law that has jurisdiction.

THERE COULD BE NO PASSING OF TITLE UNLESS, AND UNTIL AFTER, AN OFFICIAL SURVEY WAS MADE.

We have just spoken of the necessity of survey to segregate the float from the public domain.

The selection of 1863 describes nothing but a "float"—a word which nicely imports its own meaning when used in connection with a land grant. The description was not by metes and bounds, a definite area laid out on the ground. Nor was it a description of a place geographically located and known. It was a description by courses and distances, the initial point being of the most utter vagueness—"commencing at a point one mile and a half from the base of the Salero Mountain in a direction north 45° east of the highest point of said mountain." It does not profess to mark the initial point even by a monument. It leaves open for determination by the proper official, the surveyor general, exactly where it shall be taken—and then only by approximation. For what line marks the "base" of a mountain grading gently in its descent into the floor of the plain or merging into foothills ere it reaches the plain? Who can say to-day that the survey made in 1905 commenced precisely at the point intended by the selectors? Even Judge Watts is authority for the statement that a mistake had been made in the initial point so that they were taking land that it had not been intended to select. This was the very basis of his application for relocation under the guise of "amendment." True, the point is fixed now, and the land—at least some land—is

definitely known. But this is by reason of the survey and not by the order of survey or the act of selection. The survey was required to identify the land. And there can be no passing of title from the Government to the individual in a grant of quantity unless and until there has been an identified survey, locating and segregating the selected land from the rest of the public domain, and tying what was a "float" stably and permanently to the earth.

It is no answer that the description was sufficient to enable the surveyor general in 1905 to make the survey. The point is that it took *a* survey to locate the initial point. With the latter a certain monument on the ground, the rest was a matter of mathematics. But there was no determined, fixed, definite, permanent initial point until the surveyor general officially located it. It required an official act to give fixity. Different surveyors might have selected different points as answering the description in the certificate of selection. Hence it was necessary that an official surveyor—the surveyor general—should determine the point so that the survey would be binding upon the United States and upon all individuals.

The act of 1860, at the most, was a general grant that could not ripen into a particular gift until the survey was made. While an interest in a certain quantity of land vested immediately perhaps, there could be no transfer of title until survey and severance, and if at that time it should appear that the land was of the character expressly with-

held by the terms of the general grant, then the particular gift must fail and the grantees could take nothing. As to the first proposition, see *Rutherford* v. *Green's heirs* (2 Wheat., 196); *Hornsby* v. *United States* (77 U. S., 224).

In *Stoneroad* v. *Stoneroad* (158 U. S., 240), this court dealt with another section of the act of 1860 involving the question whether, as to the section confirming the claim of Preston Beck to a Mexican grant, a survey was by necessary implication contemplated. You held that it was. The court said:

> It is not to be presumed that Congress intended, by confirming a grant which had never been surveyed, and had, therefore, never been distinctly separated from the public domain, to exempt it from the survey essential to its accurate segregation and delimitation, especially when this survey was fully provided for by the general law, in accordance with the uniform public policy of the Government in dealing with questions of this character. The general rule being to exact a survey, the grant hereunder consideration could only be exempted from this requirement by an express statement in the act of Congress indicating an intention to depart from the rule in the particular instance. No such intention is anywhere expressed in the confirmatory act. Indeed, the idea that the act, whilst confirming the title, did not contemplate a survey for the purpose of marking its limits amounts to the contention that the public domain itself should remain in part forever unsurveyed and undetermined.

> since a separation of the private claim from the public domain was essential to the ascertainment of what remained of the latter. * * *
>
> As we have seen, a survey was necessary. Now, if the survey was illegal, and is to be treated as not existing, then we are without the guidance provided by law for the purpose of ascertaining whether the land claimed from the defendant was within or without the area of the grant. In other words, if it be conceded that there is no survey, the plaintiff is without right to relief, since a survey was essential to carry out the confirmatory act.

In the grant to the Bacas, however, there can be no doubt of the need of a survey because that section of the act devoted to their claim expressly directs, not only that there shall be a survey but that the surveyor general of New Mexico is to be the officer whose duty it is to make survey and location.

In the argument by counsel for appellees before the Court of Appeals much stress was laid on the fact that the United States had received benefits by reason of the acceptance by the Baca heirs of lands other than the Las Vegas grant. In other words, it was sought to make it appear that the United States had received benefits and is now repudiating its part of the transaction.

The facts are that the United States received absolutely no benefit in the matter, but merely made a gift of whatever it did give to the heirs of Baca. There were two Mexican grants at Las Vegas, either

one of which would have been good if the other had not existed. There were two claimants to the Mexican grant. Certainly the United States had no interest in the grant one way or the other, except to see it settled as between claimants. It was under no obligation by a treaty, or in morals, to give two grants of land in order to satisfy rival claimants to one grant. Merely in order to effect a settlement, the title of one claimant was confirmed and the other claimant, these heirs of Baca, were allowed the right to make selections in lieu upon stipulated conditions. The United States, far from receiving any benefit in the matter whatever, in reality was giving away a large body of land merely to settle a dispute between two factions as to the ownership of the land at Las Vegas.

Whatever the Baca claim may be, it is a grant from the United States and not from Mexico. If the act of 1860, so far as the Baca heirs are concerned, were a statute confirming a grant from Mexico, the case would be tested by the rules governing the confirmation of the Mexican grant, and nothing that happened in this case in 1864 could have passed the title.

Where the grant was for quantity and not by description or place named, the land under Mexican law required survey and segregation by the officers of the Government. Any measurement by the grantee was inoperative for any purpose (*Hornsby* v. *United States*, *supra*), and the same right which

Mexico had, passed with all other public rights to the United States upon cession of the country, and was, and is, exercised by the United States in pursuance of their laws (*Hornsby* v. *United States*, *supra*).

In *Lecompte* v. *United States* (52 U. S., 114, 126) it was held that there must be a severance of the property claimed from the public domain either by actual survey or by some ascertained limits or mode of separation recognized by a competent authority, and that has always been the act of the Government's official surveyor.

In this case there is a double reason for an official act of severance: not only to ascertain mere boundary lines, but in the absence of other means of information, as in this case, to enable the surveyor general, whose duty it was, in the first instance at least, to ascertain and determine whether the land so selected by the heirs was such as the Congress of the United States authorized them to take.

If a survey be not necessary to the passing of legal title and if legal title has passed, as appellees claim, they have long been in a position where they could have maintained suits against trespassers for the possession of this land. They do not need this survey, on their contention; and we wonder why they want it, or the resulting plat and field notes, unless it possesses some efficacy of benefit to them. If it does, the Secretary, warned by the *prima facie* showing made against the integrity of their claim, should stay the filing of the plat and field notes. For, as was

said in *Knight* v. *Land Association* (142 U. S., 161), quoted in *Peyton* v. *Desmond* (129 Fed. Rep., 1):

> For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that, by reason of some newly ascertained fact, the patent, if issue[1], would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated which it would be immediately his duty to ask the Attorney General to take measures to annul.

THE CONFLICTING GRANTS.

In respect to the Tumacacori, Calabazas, and San Jose de Sonoita claims the department's position is fully set forth in the decisions of June 30, 1900 (Record, p. 220), and March 5, 1901 (Record, p. 230). It is also summed up in the last decision, June 2, 1908 (Record, p. 118):

> It is contended that the department has erred in its construction of section 8 of the act of July 22, 1854, in holding (30 L. D., 97, id., 497) that the portion of the selected tract in controversy covered by the Tumacacori, Calabazas, and San Jose de Sonoita claims were, by operation of said section 8, in a state of reservation at the time of the selection of June 17, 1863, and thus not "vacant land" within the meaning of the act of June 21, 1860,

although the claimants did not file their claims with the surveyor general until after the filing of the application by the Baca heirs. Appellant urges that there could be no "claim" initiated until such was preferred to the surveyor general and that until such action was taken the land was public land; in other words, that through operation of said section 8 no land became "reserved" and therefore inappropriable while *sub judice*, until there had been a *demand* made therefor upon the proper officer—not, in this case, made until after the Baca claimants had acted.

The position taken by the department (30 L. D., 97 and 497) is that the act of July 22, 1854, did not require any affirmative action on the part of those claiming, under alleged Spanish or Mexican grants, to place the land covered by these claims in reservation; that the statute, silent as to any demand being made on the part of the claimants, of its own vigor reserved such land from any appropriation until the validity of the Spanish or Mexican claims had been adjudicated.

The position thus taken, the department is convinced, is sound. By virtue of the articles of the treaty of Guadalupe Hidalgo alone, no land contained within the claimed limits of any Mexican grant was reserved. (*Lockhart* v. *Johnson*, 181 U. S., 516.) Withdrawals or reservations depended entirely upon legislative action—and the terms or conditions of said reservations necessarily upon the terms of the statute by which they were created. Thus, in respect to certain claims within the

territorial limits of California, Congress, on March 3, 1851, provided that all lands the claims to which should not be presented within two years therefrom should "be deemed, held, and considered to be a part of the public domain of the United States." This was notice to all claiming under a Mexican or Spanish grant to assert and maintain their claims within a certain time before a commission for that purpose appointed, else the land claimed would become part of the public domain and consequently subject to other appropriations. A failure thus to assert or present the claim, or to prosecute, terminated the reservation; to perpetuate the reservation until there had been a final adjudication of the claim, the statute creating the reservation imposed a duty on the claimant to make a demand. (*Newhall* v. *Sanger*, 92 U. S., 761.) But in the case at bar, the lands affected by the Tumacacori, Calabazas, and San Jose de Sonoita claims were subject to another statute (act of July 22, 1854), the terms of which, in creating the reservation, did not impose the duty of presenting a demand on the part of the claimants to the surveyor general. It was the latter's duty "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico." On him, apparently, was placed the initiative. And so from 1854 until the establishment of the Court of Private Land Claims, by act of March 3, 1891 (26 Stat., 854), the tracts embraced by the Tumacacori, Calabazas, and San Jose claims, irrespective

of the validity of those claims, were not open for disposition by donation or otherwise as a part of the public domain. (*Lockhart* v. *Johnson*, 181 U. S., 516, 526.) *A fortiori*, they were not subject to selection under an act which expressly excluded land that was occupied, such as the act of June 21, 1860. It follows that such portions of the selection of June 17, 1863, as fall within the claimed area of these grants were, on the date mentioned, excluded from consideration in the passing of title to the location as a whole.

The plat and field notes of the survey of Baca Float No. 3 recently made do not contain the approval of the surveyor general. On the contrary, he refuses his approval on the ground that the area included in the selection of June 17, 1863, was at the date of said selection known to be occupied in part and mineral in character.

The Ingalls report (Record, p. 255, *et seq.*) shows that at the time the Baca heirs made the selection of June 17, 1863, Gandara had his hacienda at Calabazas, with a retinue of servants and soldiers—corrals, buildings, lands in cultivation; herds and factories.

Poston, one of the later Baca Float claimants, so testifies to the "vacant" (?) character of the conflicting claims in 1863. (Record, p. 263.)

Another line of reasoning, supported by the authority of decisions of the Supreme Court, leads to the same result.

It is provided by section 8 of the acts of Congress, 1854, that the surveyor general of New Mexico shall investigate under the instructions of the Secretary of the Interior the titles to Mexican land grants and that reports thereof shall be made to Congress; and—

> With a view to confirm bona fide grants and give full effect to the treaty of 1848, between the United States and Mexico, *and until the final action on such claims*, all lands covered thereby should be reserved from sale or other disposal by the Government.

This court in *Cameron* v. *United States* (148 U. S., 301, 308), said:

> A claim to property, under a conveyance however inadequate to carry the true title to such property, and however incompetent might have been the power of the grantor in such conveyance to pass a title to the subject thereof, yet a claim asserted under the provisions of such a deed is strictly a claim under color of title.
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> * * * * *
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> Speaking of such claims, it was said by Mr. Justice Davis "that claims, whether grounded upon an inchoate or a perfected title, were to be ascertained and adequately protected. This duty, enjoined by a sense of natural justice and by treaty obligations, could only be discharged by prohibiting intrusion upon the claimed lands until the opportunity was afforded the parties in interest for a judicial hearing and determination. It was to be expected that unfounded and fraudulent claims would be presented for confirmation. There

was, in the opinion of Congress, no mode of separating them from those which were valid without investigation by a competent tribunal; and our legislation was so shaped that no title could be initiated under the laws of the United States to lands covered by a Mexican or Spanish claim until it was barred by lapse of time or rejected."

It was urged in that case that the reservation could only be of lands "lawfully" claimed, but it was said expressly that there was no authority to import the word "lawful" into the statute in order to change its meaning, and that the act in question expressly excluded from preemption and sale all lands covered by any foreign grant or title. In *Doolan* v. *Carr* (125 U. S., 618) it was held that if the grant was of a specific quantity within designated outboundaries containing a greater area, only so much land within the outboundaries as was necessary to cover the specific quantity granted was excluded from the grant to the railroad companies. Indeed, the cases in which these rules have been applied are too numerous even to require citation. In this case there is an express finding that the report of the surveyor general limiting the grant to 4 square leagues has never been finally acted upon by Congress, and that the claim and report are still pending before Congress; in other words, that the claim is *sub judice*.

It is true that in the act of July 22, 1854 (10 Stat., 308, c. 103), establishing the office of surveyor general for New Mexico (then including Arizona), there is a provision which is

omitted in the act of July 11, 1870 (16 Stat., 230, c. 246), establishing the same office for Arizona, that "until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the Government and shall not be subject to the donations granted by the previous provisions of this act;" but as the sundry civil appropriation act of that year (16 Stat., 291) provides that the surveyor general of Arizona shall have all the powers and perform all the duties enjoined upon the surveyor general of New Mexico, there could have been no intention to change the settled policy of the Government in this particular.

The lands, therefore, within the lines of the Tumacacori and Calabasas grants were not only not vacant lands, but *were reserved from sale or disposal of any kind.*

Congress in 1854 having expressly reserved these lands from any kind of disposal until final action on said claims, and this action not having been had in 1863 and for more than a quarter century thereafter, it did not lie in the power or the jurisdiction of the Land Office to do any act or thing toward the disposal of these lands; nor can it be urged that Congress in 1854, having expressly reserved such lands, intended to permit the Baca heirs by the act of 1860 to select such reserved lands.

It was unknown at that time which Mexican titles were valid and which were not, and it was the policy of the law to reserve all from any manner of disposal until final action.

The Land Office is empowered to grant patents to homesteads, and it necessarily has the power to determine what is and what is not land properly subject to homestead entry; that is, whether the lands are mineral or agricultural lands, etc. If patent be issued upon a homestead and the land is mineral, nevertheless title passes; for the Land Office having jurisdiction of the subject matter and the authority to determine the facts, and having acted, its determination and its action are beyond the power of any court to review or reverse. But suppose the United States established a military reserve and the Land Office permits a homestead entry upon it and issues a patent; then the act of the Land Office is void, for it is doing a thing beyond its power. The military reserve was not for sale and the Land Office could not sell it.

This court said, in *Noble* v. *Union River Logging R. R.*, 117 U. S. 165, 173:

> It is true that in every proceeding of a judicial nature there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such, for example, as the service of process within the State upon the defendant in a common-law action (*D'Arcy* v. *Ketchum*, 11 How., 165; *Webster* v. *Reid*, 11 How., 437; *Harris* v. *Hardeman*, 14 How., 334; *Pennoyer* v. *Neff*, 95 U. S., 714; *Borden* v. *Fitch*, 11 Johns., 121); the seizure and possession of the res within the bailiwick in

a proceeding in rem (*Rose* v. *Himely*, 4 Cranch, 241; *Thompson* v. *Whitman*, 18 Wall., 457); a publication in strict accordance with the statute, where the property of an absent defendant is sought to be charged (*Galpin* v. *Page*, 18 Wall., 350; *Guaranty Trust Co.* v. *Green Cove Railroad*, 139 U. S., 137). So, if the court appoint an administrator of the estate of a living person, or, in case where there is an executor capable of acting (*Griffith* v. *Frazier*, 8 Cranch, 9), or condemns as lawful prize a vessel that has never been captured (*Rose* v. *Himely*, 4 Cranch, 241, 269), or if a court-martial proceeds and sentences a person not in the military or naval service (*Wise* v. *Withers*, 3 Cranch, 331), or the Land Department issues a patent for land which has already been reserved or granted to another person, the act is not voidable merely, but void. In these and similar cases the action of the court or officer fails for want of jurisdiction over the person or subject matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding.

* * * * * * *

This distinction has been taken in a large number of cases in this court in which the validity of land patents has been attached collaterally, and it has always been held that the existence of lands subject to be patented was the only necessary prerequisite to a valid patent. In the one class of cases it is held that if the land attempted to be patented has been reserved or was at the time no part of the public domain, the Land Department

> had no jurisdiction over it and no power or authority to dispose of it. In such cases its action in certifying the lands under a railroad grant or in issuing a patent is not merely irregular but absolutely void, and may be shown to be so in any collateral proceeding. (*Polk's lessee* v. *Wendell*, 9 Cranch, 87; *Patterson* v. *Winn*, 11 Wheat., 380; *Jackson* v. *Lawton*, 10 Johns., 23; *Minter* v. *Crommelin*, 18 How., 87; *Reichart* v. *Felps*, 6 Wall., 160; *Kansas Pacific Railroad* v. *Dunmeyer*, 113 U. S., 629; *United States* v. *Southern Pacific Railroad*, 146 U. S., 570.

The lands within the limits of the Tumacacori and Calabasas grants were reserved. They were not subject to selection by the Baca heirs, and it is immaterial what the Land Office did, for it had no power in the premises. In other words, it did not lie in the power of the Commissioner of the General Land Office, in any way or manner, to approve Baca Float No. 3, so far as it lay within the boundaries of the old Mexican grants. Had the survey been made, had it been approved, had all been done—yet the Land Office could pass no title, for the lands were not within its power to dispose of.

It will thus be seen that to all of that part of Baca Float No. 3 included within the lines of the Tumacacori and Calabasas grants there are two defenses and to the remainder of the grant one.

It will also be observed that under the act of Congress of 1854 no penalty was provided for failure to

comply with the request of the surveyor general and file a claim to the ownership of lands under Mexican grants. In this the act of 1854 differs materially from other acts on this same general subject. It has several times been provided in regard to other lands or claims to lands that if the claims were not filed within a certain time, then they should be deemed invalid or not to exist; but here no such penalty or limitation is provided. There is a mere demand or request that claims be made for lands under Mexican titles. The failure to make a claim in no way affected the validity of the title. Indeed, many of the old Mexican grants in the Southwest, which have been confirmed by the Supreme Court of the United States, were not claimed, and no claims were filed until, in some of them, more than 25 years had expired from the date of the passage of the act of 1854. Indeed, the creation of the Court of Land Claims was largely for the very purpose of determining the titles to the lands reserved under the act of 1854, and it was immaterial to the validity of the titles whether claims for same had been made prior to the litigation begun in the Court of Private Land Claims. There being no penalty provided therefor by the act of 1854, nor no time fixed in which claims could be filed, there is no basis for the argument that the titles were in any manner affected, made better or worse, by failure to file the claims. The lands covered by the grants were reserved until the final act of Congress thereon, whether claims were filed upon them or not.

THE COURT ERRONEOUSLY ASSUMED JURISDICTION TO TRY TITLE TO LAND SITUATE IN ANOTHER JURISDICTION.

The land in controversy is located in the State of Arizona. The appellants are, for the time being, in the District of Columbia, although their legal domiciles are elsewhere. The court's decree is an adjudication of title. Appellants claimed that title was still in the United States; appellees maintained that title was in them. The court's decision was in favor of appellees. The bill sought the trial of title under the guise of seeking mandatory relief—the filing of the survey, etc. This the court could not compel without, as it did, adjudicating title out of the United States. If the court so concluded, as it did, then the next purpose of the bill was to enjoin acts of trespass—permitting persons to initiate some sort of right under the homestead laws. That is the gravamen of the suit. We submit that the case is on all fours with that presented in *Irrigation Land & Improvement Company* v. *Hitchcock* (28 App. D. C., 587), and *Columbia Nat. Sand Dredging Co.* v. *Morton* (28 App. D. C., 288).

In the latter case the purpose of the suit was to enjoin a defendant, resident in the District of Columbia, from dredging a sand and gravel bar situate in Maryland. It was held that a bill in equity was not maintainable, although defendant resided in the District, at the instance of a plaintiff claiming to be the owner of the land, situate without the jurisdiction of this court, where said ownership is denied by

the defendant, and the principal, and substantially the only, question is one of title. That is precisely the situation in this suit.

In the *Irrigation Land & Improvement* case, brought, as in this case, against the Secretary of the Interior, and curiously, as in this case, involving title to land in Arizona, the Court of Appeals applied the same rule, with the same result. In the present case, however, it ignored its own previous decisions.

Without discussion, because it is unnecessary, we submit that the court below erred in not following the precedent.

The sixth ground of the demurrer interposed by defendants in the court of first instance was "because it appears from the allegations in the bill (particularly in paragraphs 25–30) that there are divers other persons who are necessary parties to the said bill, but who are not made parties thereto, and who are materially interested in the subject matter of the action, and who would be injuriously affected if the relief prayed for was granted, viz, those who have initiated claims within location No. 3." It thus appears that not only is the question of the title of the United States sought to be litigated in this proceeding without its consent and behind its back, but that the rights of third persons who are even more vitally interested are sought to be foreclosed and predetermined in a proceeding before a tribunal thousands of miles away from the *situs* of the property and from their domicile without making them parties and without any attempt to bring them upon the record

by substituted service or otherwise. Accepting for the purposes of the argument the theory of the plaintiffs that they are entitled to this property and that their title is already vested by virtue of certain transactions that have taken place more than 50 years ago, the present bill can not be regarded as other than one to establish their title, and, therefore, the only proper venue for the maintenance thereof would be in that court within whose territorial jurisdiction the *res*, which is the real subject matter of the controversy, is situate and where are domiciled the real adversary parties really sought to be reached and affected by this litigation.

It is averred in paragraph 31 of the bill that the "homestead entry of said Henry Ohm and the other entries referred to will throw a cloud upon the title of your orators to the land aforesaid, and is likely to cause many persons to attempt to settle upon said lands and enter the same in the land department of the United States, and that your orators will be unable to remove such persons from said lands or to quiet their title thereto as against them without a multiplicity of suits." And at this point it may be well to direct the court's attention to the fact that homestead rights are not initiated in the District of Columbia, or in the city of Washington, or in the Office of the Secretary of the Interior, but in the particular land district where the property sought to be subjected to such right is situate and in the local land office.

It will thus be seen that in any aspect in which this cause may properly be considered it is an attempt to transfer from the proper forum an action which is, in its nature, essentially local and not transitory, and to submit the question involved therein to a tribunal wholly without jurisdiction to entertain and determine the same. Equitable jurisdiction to quiet title extends not only to the removal of an existing cloud, but to the prevention of a threatened cloud as well, and the venue of the action is determined by the situation of the premises and not by the residence of the parties.

THE COURT ERRED IN DECIDING THAT APPELLEES HAD SHOWN IN EVIDENCE SUFFICIENT TITLE TO ENABLE THEM TO MAINTAIN THIS SUIT.

The appellees are not living in brotherly concord. There are two sets of them; and while they have but a single thought and their hearts beat as one in the proposition that title passed from the United States to the heirs of Baca in 1864, they are in discord as to whom such title has descended. C. C. Watts and Dabney C. T. Davis, "trustees," claim under a series of conveyances from John S. Watts—conveyances describing the 1866 location. John Watts and James W. Vroom take the position that their colleagues have acquired and own just such interest as John S. Watts had in the land described in his conveyance (the 1866 selection); and as John S. Watts owned nothing within the described outboundaries of that 1866 selection, so C. C. Watts and Davis, "trustees," own nothing; certainly not in the 1863

selection, which was never conveyed to them. The elder Watts, dying intestate, and not having conveyed the 1863 selection (the land here in controversy), such title as he had descended to his heirs, under whom they, John Watts and James W. Vroom, claim.

But common to both claims of alleged title is the initial conveyance—the document which purports to be a conveyance to John S. Watts from the heirs of Baca.

This conveyance is reproduced *in extenso* on pages 316–321 of the record. The major portion of it looks much like a census enumerator's report of the population of New Mexico in 1864; but we are told that it is merely the roll call of the heirs of Luis Maria Cabeza de Baca. The conveyance so recites them to be—heirs, or owners of the interests of heirs, of said Baca.

We respectfully submit that there is not a scintilla of evidence in the record showing that they were the heirs of Baca.

The court below apparently took the view that as this is an old deed, the recitals furnish sufficient proof of the heirship, especially as no proof to the contrary has been shown by the appellants.

The court erred, we submit. It did not devolve upon the defendants below to prove a negative—to show that these were not the heirs of Baca. It was part of plaintiffs' case affirmatively to show that they were the heirs. They, however, rested their case on the recitals of the deed, relying upon it as an ancient document.

Conceding its antiquity, there is a missing element in the familiar doctrine of proof which the recitals may afford—possession of the land consistent with the recitals of the deed.

In *Wilson* v. *Snow* (35 App. D. C., 562) the Court of Appeals decided that the court below did not err in submitting to the jury as evidence the recitals of a deed 50 years old, citing several decisions. It is true that in expression nothing was said about possession consistent with the terms of the ancient deed; but the cases upon which the court relied show that element. This court, however, when the case was transferred to that tribunal, in affirming the decision (228 U. S., 217), held (syllabus):

> The rule that an ancient deed to property in continuous possession of the person producing it proves itself on the theory that the witnesses are dead and it is impossible to produce testimony showing execution by the grantor is broad enough to admit, without production of the power of attorney, ancient deeds purporting to have been signed by agents.
>
> The other necessary facts being present, and the possession of the property being consistent with its terms and the original records having been lost, a deed, over 40 years old, containing recitals that it was executed by an administrator under power of sale given by order of the court will be presumed to have been executed in accordance with such recitals.

In this case there is no proof as to heirship or of conveyance from the heirs to those who participated

in the conveyance as owners of an heir's share. For aught that is shown to the contrary, these may have been wholly fictitious persons—or real persons in no way related to Baca.

The recitals of this deed were inadmissible to prove the allegations recited, because there was not, and is not, possession consistent with the terms of the conveyance. Far from it. As a matter of fact, and as already shown, the several claimants from 1866 down were claiming, although not in possession of, land wholly different from that described in the purported conveyance from the self-styled heirs of Baca.

THE TRIAL COURT WAS WITHOUT JURISDICTION AND THE COURT OF APPEALS ERRED IN ASSUMING JURISDICTION IN THE ABSENCE OF THE UNITED STATES AS A NECESSARY PARTY.

We said at the outset of the argument that fundamentally a question of jurisdiction arises and precedes all other questions, although we have first discussed at great length the merits of the case as it has been presented before the land department.

We respectfully submit that the trial court was without jurisdiction to grant any part of the relief demanded in the bill and that it erred in assuming jurisdiction and in enjoining, so far as it did, the appellants. The appellate court erred in not correcting this usurpation of jurisdiction.

The decree is an out-and-out determination that title passed out of the United States in 1864 and vested in the heirs of Baca; and this behind the back of the United States, and without its being heard.

The appellants had been sitting as a court, the only court clothed with jurisdiction, trying that question, if you please, between the United States and the appellees. It decided in favor of the United States, first, that legal title still remained in United States; second, that the lands embraced in the Tumacacori, Calabazas, and Sonoita grants were in any aspect exempt from selection by the Baca claimants; but that, as to the residue, it is possible that the appellees have an equitable claim—a point to be decided after a hearing affording the claimants opportunity to present evidence bearing upon the character of the land in rebuttal of the showing made by the report of the surveyor general accompanying the Contzen survey.

Appellants, as defendants, were not in a position to plead as fact that the land in controversy was mineral, and occupied at the date of selection, and was so known to be by the selectors; that a great fraud had been perpetrated, and that the purpose of the suit was only to effectuate and to perpetuate that fraud. Those were matters which the appellants, in their quasi-judicial capacity, had reserved for decision when, and after, the claimants had made their case. In fact, there is naught in the departmental decision of June 2, 1908 (Record, p. 281), to show but that the claimants might ultimately, at the hands of the appellants, receive all the relief they seek in court, barring title to the area embraced in the conflicting grants. It all depended upon what the evidence would ultimately show as bearing upon

the known character of the land—*a matter that has never been finally adjudicated, one way or another*, by the Land Department.

On the other hand, were the United States a party to this suit, *it could well plead as fact that the land was occupied, that it was mineral, that it was so known to be in 1863 by the selectors, and that the proceeding from start to finish was vitiated by fraud.* On these points, we submit, the United States is entitled to be heard—and has not been heard.

If this is public land of the United States, as appellants insist, the court has no jurisdiction to interfere with the control vested by Congress in the defendants over such public land.

If it be not public land, the court must so determine (in effect exercising appellate jurisdiction over the Land Department) before it can afford the relief sought. And in so determining it must decide adversely the claim of the United States, behind its back and without its consent.

We maintain that it is the function of the appellants to determine whether or not the land in controversy is public land—and that they have so determined it to be.

The trial court signally failed to appreciate this point. In the opinion (Record, p. 306) the learned judge says that the averments and the exhibits do not justify the assertion that the appellants have decided that Baca Float No. 3 is public land belonging to the United States, although (on p. 307) he notes the allegation in the answer that title to said

tract still remains in the United States. He failed to perceive that the decision of June 2, 1908, holds that the land is yet part of the public domain, to be administered as such, subject to any equitable claim or title in the appellees; that there is no uncertainty now as to whether it is public or private land; and that the only question reserved for subsequent decision is whether, as public land now, the appellees will, after the hearing before the surveyor general, be entitled to a conveyance of it by virtue of their selection in 1863. In other words, the land is now, as it was in 1863, public land, and the question is whether it is of the character that the heirs of Baca were authorized to select, so that, having selected it in 1863, the Land Department may now take the necessary steps to devest the United States of title and vest it in the claimants.

In arriving at the conclusion that legal title is still in the United States, that the proceedings by the Baca claimants to acquire that title are still *in fieri*, and that the final step to pass title out of the United States has not yet been taken, the appellants were called upon to determine the effect or operation of various actions taken from time to time by various officers of the Land Department and by the representatives of the Baca heirs and the proper action to be taken with reference to this Contzen survey and the surveyor general's report thereon.

The court can not determine these questions without reviewing precisely those matters which the appellants considered. The court must consider and

determine whether the actions of the Secretary and his subordinates involved any measure of discretion and judgment, whether his decision was a possible one, or whether there was no room for the exercise of discretion or judgment, and hence that his action was capricious or arbitrary.

The authorities, we believe, are ample, pertinent, uniform, and decisive.

In *Oregon* v. *Hitchcock* (202 U. S., 60) the State obtained leave of court to file an original bill against the Secretary of the Interior and the Commissioner of the General Land Office, to restrain defendants from allotting or patenting certain lands within the Klamath Reservation, which, it was alleged, were, March 12, 1860, swamp and overflow lands (title to which passed to the State under the swamp-land grant, 9 Stat., 519; 12 Stat., 3), and for a decree which would establish title in the State of Oregon. Plaintiff claimed that through its proper officer it had presented and filed with the surveyor general of the United States for the State of Oregon a list of these lands, together with evidence tending to prove the character of the land—i. e., that it was such as passed to the State under the swamp-land act; but that the Land Department had denied and rejected their claim solely on the ground that the lands, swamp or otherwise in fact, were not granted to Oregon by the act of Congress on which that State relied.

Note the striking similarity: The State, as do these appellees here, relied upon Federal legislation as the basis of their title; they relied upon facts—character

of land such as the legislation purported to convey (although in the case at bar appellees do not show, not even aver, that the land they seek is of the character they were entitled to select); that they filed their list and their proof with the surveyor general, who favorably passed upon their evidence and certified the list, although in this case no surveyor general has ever favorably considered evidence as to character of land; and that the Land Department had rejected the State's claim, not because of facts, but because the officers of the department did not take the same view of the law that the State of Oregon did.

We have called attention to similarities, and there are many points favoring the contentions of the plaintiff in the *Oregon* case that are missing in the case at bar. A few have been noted.

Plaintiff took the position, as they do here, that the immunity of the sovereign from suit does not extend to those who act for it—the defendants not only in that case, but in this case; and that while the United States can not directly be sued, the acts of those who assume to act for it may be judicially examined and controlled.

The court held against the plaintiff State. It said that while the defendants were citizens of a State other than Oregon, yet they had no interest whatever in the controversy, and that if a decree were rendered against them in favor of the State it would affect not their interests, but would "bind and determine the rights of the United States, the real,

substantial defendants." Following *Minnesota* v. *Hitchcock* (185 U. S., 373), it decided that the test as to whether the United States is a party is to be determined by the effect of the judgment or decree to be rendered.

Can language be more pertinent to this case than that employed by the court in the *Oregon* case? The facts, to be mentioned later, show that for nearly half a century the United States has treated the land here in controversy as its own, subject only to such equities as may exist in favor of the plaintiffs. It concedes that the heirs of Baca selected this land in 1863; it concedes that if it be of the character that these heirs were entitled to select it owes them the duty of conveying the legal title; but it insists that ere that is done it must have information as to the character of the land. In the meantime, treating it as public land (and between 1866 and 1899 no Baca claimant thought for a moment that title to the 1863 location was in another than the United States), it has permitted homestead entries and other tentative applications for tracts under general public-land laws, and has, in a few instances, between 1866 and 1899, while the Baca claimants were claiming under the 1866 location, patented the land so entered. But with these exceptions it has retained the land, patiently awaiting the time when the Baca claim could be finally adjudicated—rejected, if the surveyor general's report is correct; admitted, if it should appear that he was wrong.

With this history, how can a court, without usurping a jurisdiction not granted it by act of Congress, adjudicate title out of the United States, behind its back, under guise of merely entertaining a suit against certain officers of the Federal Government?

In 1908 another suit was started by another State (Louisiana) in which the Secretary was named defendant. (*Louisiana* v. *Garfield*, 211 U. S., 70.) This was a suit "to establish the title" of the State to certain swamp lands and to enjoin defendant against carrying out an order making a different disposition of the lands.

We have quoted four words from the opinion of Mr. Justice Holmes, "to establish the title." Of course, this was merely the court's summary of the purpose and the effect, if successful, of the suit; precisely as it would be in the case at bar.

The State of Louisiana took the position that the whole of the swamp and overflowed lands unfit for cultivation were granted to the State by the act of March 2, 1849 (9 Stat., 352), with certain exceptions. The first prayer of its bill, after the formal demands, was that the Supreme Court should so decree. They then proceeded to ask the court to hold that the approval by the Secretary, December 10, 1895, of list No. 51 vested *eo instanti* the fee simple in the State; and that title, so having vested, the acts sought to be enjoined were beyond the power of the defendant to perform.

This is what the court sums up as a bill "to establish the title" of the State to the lands involved.

What, can it fairly be said, is the purpose of the bill in the case at bar if it be not precisely this thing?

Appellees contend they acquired title to the selection of 1863 by certain acts and instruments; that because they thus acquired title, the appellants owe them certain duties—the filing of the Contzen survey; and that as they are not particularly charmed with some of the features that the Contzen survey educed and portrayed on the plat of survey, a revised edition be ordered before it is filed.

Their whole case proceeds from the premise that title passed to them in 1864. If that be not so, they concede that they are not entitled to maintain their bill.

Who says it is not so? Either the United States, whom the court is not hearing on this point, or the appellants, whose decision, contrariwise, the court must review.

But it is exactly as it was in the *Louisiana* case: Plaintiff there was asking for relief on an hypothesis that title had passed—an hypothesis which demanded of the court a decision that title had passed. The court said well when it said that it was a suit "to establish the title." The instant suit is an idle tax on the court's time if it be not exactly the same thing.

The court below so viewed the matter and decided not only that title had passed out of the United States but that it is now vested in the appellees.

In the *Louisiana* case, as in the *Oregon* case, the Supreme Court declined to try the issue without affording the United States a chance to be heard.

The ingenious contentions of counsel in that case might be tenable; but they raised questions of *law* as well as of fact upon which the United States would have to be heard. On page 77 of the opinion, the court suggests several points that the United States might urge in defense.

The syllabus of the *Louisiana* succinctly states the decision of the court:

> This court has no jurisdiction of an action brought by a State against the Secretary of the Interior to establish title to, and prevent other disposition of, lands claimed under swamp-land grants where questions of law and fact exist as to whether the United States still owns the lands. The United States is a necessary party, and the action can not be tried without it.

That was a suit against the Secretary; so is this. That was a suit to establish title; so is this. That was a suit to prevent other disposition of the lands claimed by plaintiffs; so is this. That was a case where questions of law and fact existed as to whether the United States still owned the land; so is this. That was a case where the United States was a necessary party, without whom the court had no jurisdiction to try the questions involved; so is this.

Appellees attempt to lift themselves over the fence by their boot straps. They say that neither the *Oregon* nor the *Louisiana* cases have any application here, because in both those cases legal title was in the United States, while in this suit it is not.

That is the very point in contention here; they say legal title passed in 1864; we say it did not. On this point hangs all the law—and their profits.

THE KIRWAN CASE.

The case of *Kirwan* v. *Murphy* (189 U. S., 35) is illuminating and is absolutely decisive of the material points in this case. The court therein held that the administration of public lands is vested in the Land Department; that its power can not be divested by the fraudulent action of subordinate officers; that the courts can neither make nor correct surveys; that the power to do so is in the political department of the Government, and that the Land Department must primarily determine what are public lands subject to survey and disposal; and that, as it is possessed of this power in general, its exercise of jurisdiction can not be questioned by the courts before it has taken final action, and then only in a proceeding in which the action of the department is collaterally attacked. The court said:

> The Land Department must necessarily consider and determine what are public lands, what lands have been surveyed, what are to be surveyed, what have been disposed of, what remain to be disposed of, and what are reserved. The department has held that the land lying between the alleged meander line and the lake, some 1,200 acres, is Government land, and has ordered it to be surveyed. (*In re Burns*, 20 L. Dec., 28, 295; 23 L. Dec., 430.) The execution of that order was restrained by

the preliminary injunction herein, and that has been made perpetual by the decree.

We are confronted on the threshold with two objections to the maintenance of this bill, namely, the want of jurisdiction in equity and the want of jurisdiction thus to interfere with executive administration.

Equity jurisdiction was invoked on the ground of lack of adequate remedy at law in that irreparable injury in the destruction of timber and exposure to fire by the survey, and multiplicity of suits were threatened.

* * * * *

The administration of the public lands is vested in the Land Department, and its power in that regard can not be divested by the fraudulent action of a subordinate officer, outside of his authority, and in violation of the statute. (*Whiteside* v. *United States*, 93 U. S., 247; *Moffat* v. *United States*, 112 U. S., 24; *Hume* v. *United States*, 132 U. S., 406, 414.) The courts can neither correct nor make surveys. The power to do so is reposed in the political department of the Government, and the Land Department, charged with the duty of surveying the public domain, must primarily determine what are public lands subject to survey and disposal under the public-land laws. Possessed of the power, in general, its exercise of jurisdiction can not be questioned by the courts before it has taken final action. (*Brown* v. *Hitchcock*, 173 U. S., 473.)

In *Litchfield* v. *The Register and Receiver* (9 Wall., 575), Litchfield sought an injunction to restrain the register and receiver of the United

States land office at Fort Dodge, Iowa, from entertaining and acting upon applications made to them to prove preemptions to certain lands which lay within the land district for which they were respectively register and receiver. The bill averred that complainant was the legal owner of the lands; that they were not public lands, and were in no manner subject to sale or preemption by the Government or its officers. The bill was dismissed for want of jurisdiction in equity, and this court affirmed the decree. Mr. Justice Miller said: "The principle has been so repeatedly decided in this court, that the judiciary can not interfere either by mandamus or injunction with executive officers such as the respondents here, in the discharge of their official duties, unless those duties are of a character purely ministerial and involving no exercise of judgment or discretion, that it would seem to be useless to repeat it here." (*Gaines* v. *Thompson*, 7 Wall., 347; *The Secretary* v. *McGarrahan*, 9 Wall., 298.)

It was held that the fact that complainant asserted himself to be the owner of the tract of land, which the officers were treating as public lands, did not take the case out of that rule, where it was the duty of these officers to determine, upon all the facts before them, whether the land was open to preemption or sale; and further, that if the court could entertain jurisdiction, the persons asserting the right of preemption would be necessary parties to the suit.

Mr. Justice Miller further said: "After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded, he may seek redress in the courts. He insists that he now has the legal title. If the Land Department finally decides in his favor, he is not injured. If they give patents to the applicants for preemption the courts can then in the appropriate proceeding determine who has the better title or right."

* * * * *

Noble v. *Union River Logging Company* (147 U. S., 165) is not to the contrary, for that was a case where the executive department had confessedly finally acted and then attempted to resume jurisdiction, and an injunction was sustained. But the Government raised no point as to the form of the remedy; deprivation of a vested legal right of property, acquired before any suggestion that it could be taken away, was threatened; and it appeared that the only remedy was through equity interposition. (*Cruickshank* v. *Bidwell*, 176 U. S., 73, 80.) In this case, whether the lands lying between the alleged meander line and the lake were public lands or not was for the Land Department to determine in the first instance; and if error was committed, this is not the way to correct it.

Noble v. *Union River Logging Ry. Co.*, cited above, brings into relief the distinction we seek to make. In that case there was no question as to the nature of the act by which a title or a right was to vest. A Secretary approved a map of definite location, demarking a right of way, by which a right vested.

There was no dispute about the effect of such an act. It always operated to convey a right from the United States to the grantee. The Land Department "had *confessedly* finally acted," as the court said. The question in that case was whether another Secretary, moved by a conviction that his predecessor had been imposed upon, could *revoke* and *annul* that approval and that action by which title passed. The Secretary proceeded from the premise that title passed, but was improperly obtained; he so appreciated the effect of the act of approval that he felt bound to undo it. The court held that he could not. The point as to *whether* title passed was not litigated; the point was the scope of the Secretary's power *after* title passed. If title had not passed, the court was confessedly without jurisdiction to interfere. If title passed, induced by the false representations of the grantee, could the Secretary treat the passing act as a nullity? The proposition as stated by the court was not its power to enjoin the Secretary but the power of the Secretary to annul the action of his predecessor when such action operates to give effect to a grant of public lands.

Now, apply that case to the one at bar:

If confessedly the letter of April 9, 1864, was an instrument by which title passed and the appellants were now seeking to annual and vacate it for the reason that the Commissioner of the General Land Office had been duped into signing it through the fraud of the claimants, we would have something akin to the situation in the *Union River* case.

But we have not. The question is not the nullifying of an action recognized as final, but whether or not that action did or could transfer title out of the United States. It is on that point that the United States is entitled to be heard, if it consented to be sued.

But why should it? Through its Congress it has constituted a tribunal—the Land Department—for the trial of such cases. That department, charged with the disposal of public lands, must, and constantly does, determine what is and what is not a part of the public domain; whether title is in or out of the United States as to any particular tract. The law provides no direct appeal to any judicial tribunal. True, if the department errs in law, the aggrieved parties have their remedy, not in any suit against the United States, or the officers of the Land Department, but in suits against those who are the beneficiaries of the department's mistake of law. The doctrine is very familiar. Departmental decisions on questions of fact are conclusive on the courts, but its decision on points of law is subject to collateral attack. The department has decided that the letter of April 9, 1864, did not operate to pass legal title; so far as that is a question of law, the decision does not bind a court when it is collaterally attacked; but it may not be attacked in a direct proceeding against the department. For instance, if the appellees were to sue in ejectment any one of the several parties who are now in possession of portions of the 1863 location, relying

on title deraigned from the United States under such decision of the department, the propriety of that decision could be questioned in such a suit.

But in the case at bar the attack is direct. It challenges the title of the United States—an issue that should be tried between the claimants of the title and the United States; or it challenges the correctness of the departmental ruling as to what is necessary to pass title, and is, hence, an effort in substance to obtain directly a review of that decision. This, in repeated decisions of late, the courts have decided may not be done.

In the recent case of *U. S.* ex rel. *Goldberg* v. *The Secretary of the Navy*, decided by this court on December 1, 1913, the relator claimed that he had acquired by purchase, through filing the highest bid, a certain vessel advertised for sale by the United States, and he asked for a mandamus to compel the Secretary of the Navy to deliver the vessel to him. The answer admitted the facts but set up as a defense that the bid was not an acceptance of an offer and had never been accepted by the Secretary. On demurrer to the answer, the court dismissed the petition on the ground that the discretion of the Secretary was not ended by receiving and opening the bids although they satisfied all conditions required. This court said:

> We see no sufficient reason for throwing doubt upon the premise for the decision, but there is another that comes earlier in point of logic. The United States is the owner in possession of the vessel. It can not be interfered

with behind its back, and, as it can not be made a party, this suit must fail.

The Secretary did not own the vessel. Neither does the Secretary of the Interior own the land involved in this suit.

Either Goldberg, the relator, or the United States had title to the cruiser. Goldberg would have put himself out of court if he had not claimed title and alleged that the Secretary had merely a ministerial duty to perform which he was neglecting to perform.

So here: Appellees necessarily claim title to the land. If they did not, they would have no standing in court. The appellants and their predecessors, the guardians of the public domain, have insisted that the United States owns the land. The United States has been in possession of it this last half century.

The point is that the trial of that issue can not proceed in the absence of the United States any more than the trial of title to the cruiser could have proceeded behind the back of the United States.

The decision of the court that title passed out of the United States does not remedy matters. The court has no jurisdiction to decide that point unless the United States, consenting to be sued, is heard.

The jurisdiction does not depend upon what the court from the record is able to decide. The point is that it can not proceed to decide in the absence of a party whose claim of title is to be affected by the decision.

THE COURT TREATED THE SUIT PRACTICALLY AS AN APPEAL FROM THE SECRETARY AND ERRONEOUSLY ASSUMED JURISDICTION TO REVIEW, AND DID REVIEW, A MATTER EXCLUSIVELY WITHIN THE JURISDICTION OF THE APPELLANTS, INVOLVING, ON THEIR PART, THE EXERCISE OF JUDGMENT AND DISCRETION.

In *Fisher* v. *United States* ex rel. *Grand Rapids Timber Co.* (37 App. D. C., 436) a question in principle not unlike this came up. A proviso to the seventh section of the act of March 3, 1891 (26 Stat., 1095), granted a right to land two years after issuance of receiver's final receipt under certain circumstances, i. e., where there was no pending protest or contest. The exact language is:

> *Provided*, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him.

In other words, his title ripened perfectly at the end of two years if there were no pending protest or contest, and a mere ministerial duty remained in the Secretary in that event—to issue the muniment of that title. The department, and all who claimed under that act, had persistently treated the proviso as confirmatory in its operation. If there were no protest or contest—a proposition involving law and fact—the Secretary's jurisdiction over the land

ceased and determined at the end of two years. Anything, other than issuing patent, that he might attempt to do would be *ultra vires*. To determine whether there was a protest, two questions had to be considered: First, was there actually, physically, filed within the two years any paper attacking the validity of the entry—a question of fact; and, second, was such paper or its contents sufficient in law to constitute a legal protest or contest—a question of law.

The theory of the *Grand Rapids* case was that the court had a right to determine whether the paper relied upon by the Secretary was in law a protest; because if it were, the Secretary had jurisdiction; if it were not, the converse would be true.

This is exactly the situation in the instant case: If the letter of April 9, 1864, was sufficient to pass title, the Secretary had no jurisdiction over Float No. 3 after that date, except a ministerial function to perform; just as, in the *Grand Rapids* case, he would have power merely to issue the patent.

The trial court in the *Grand Rapids* case took the relator's view of the law, and fell into the same error that the court below did in this case. The learned judge decided that the paper relied upon by the Secretary was not a protest within the meaning of the law, either as interpreted by the court or in the view for a long time obtaining in the department itself. He therefore granted a mandamus to compel issuance of patent and to vacate and recall all notations tending to cancel or purporting to cancel the entry.

In the Court of Appeals the court starts out with the proposition that the case turned upon the interpretation to be placed upon the proviso above cited. Mr. Justice Van Orsdel, speaking for the court, then pointed out that in the absence of any specific act of Congress to the contrary, the entire administration of the disposition of the public lands is within the jurisdiction of the Commissioner of the General Land Office, subject to the direction and supervision of the Secretary. The court held whether or not a letter and telegram constituted a protest within the meaning of the law was a matter calling for decision by the Secretary—just as in this case the Secretary was called upon to decide whether or not legal title passed out of the United States in 1864, whereby he lost jurisdiction except to perform some ministerial function.

The court said:

> * * * In the determination of this question the Secretary may have been mistaken in holding it sufficient to constitute a technical protest within the rules and precedents of the Land Department, but any attempt on our part to review his action in this proceeding would be to convert a writ of mandamus into a writ of error. It was within his jurisdiction to determine the sufficiency of the protest, or whether it, in fact, constituted a protest at all; and having decided that it did, it is beyond our power to review his decision.
>
> * * * If, in the present case, nothing had been pending at the expiration of the two years from the issuance of the final receipt, and the Secretary had arbitrarily refused to

issue a patent, we would have a very different case. But here, at the expiration of the limitation fixed by law, a case was pending challenging the right of the grantee of the entryman to a patent. It will not do in this proceeding to say that it did not amount to a protest under the law. That was for the Secretary to decide. There is no way open for us to determine this question without exceeding our jurisdiction and reviewing the lawful acts of the Secretary of the Interior in the due exercise of his authority to administer the laws relative to the disposition of the public lands of the United States.

While it is true that arbitrary power resides nowhere in our system of government, and while the supervisory authority vested in the Secretary of the Interior and the Commissioner of the General Land Office over the disposition of the public lands is neither unlimited nor arbitrary, yet the question here presented as to whether or not the communications and order amounted to a protest, which we regard as exceedingly close, was one clearly within the power of the commissioner to decide. To say that he was mistaken would require us to review a matter exclusively confided by law to his discretion and judgment.

The net effect is that the Secretary had power, not directly reviewable by a court, to decide his jurisdiction. If the *Grand Rapids Timber Co.* were right in its contention, the Secretary, save for a single ministerial duty, became *functus officio* two years from the date of receiver's receipt. But the court de-

clared itself powerless to interfere with the Secretary's decision, right or wrong.

So in this Baca Float case. The Secretary may be right or wrong in deciding that the letter of April 9, 1864, was insufficient to pass title; that something more was required. The point is that he decided, and the court can not, in the absence of caprice or arbitrariness, directly review his decision. That can only be done later, in another form of proceeding, and collaterally.

We speak of caprice and arbitrary conduct. We borrow the expression from the decision of this court, in *United States* ex rel. *Ness* v. *Fisher* (223 U. S., 683), wherein the court said:

> The Secretary's decision rejecting the relator's application was not arbitrary or capricious, but was based upon a construction of section 2, which was at least a possible one, had long prevailed in the Land Department, had been approved in *United States* v. *Wood* (70 Fed. Rep., 485) and *Hoover* v. *Salling* (102 Fed. Rep., 716), and has since been sustained by the Court of Appeals in the present case. True, a different construction had been adopted in *Hoover* v. *Salling* (110 Fed. Rep., 43) and has since been followed in *Robnett* v. *United States* (169 Fed. Rep., 778); but this, instead of indicating that the Secretary's decision was arbitrary or capricious, illustrates that there was room for difference of opinion as to the true construction of the section, and that to determine

whether the relator's application conformed thereto necessarily involved the exercise of judgment and discretion.

So at the outset we are confronted with the question, not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law and involving the exercise of judgment and discretion, may be reviewed by mandamus and he be compelled to retract it and to give effect to another, not his own and not having his approval. The question is not new, but has been often considered by this court and uniformly answered in the negative. (*Decatur* v. *Paulding*, 14 Pet., 497, 515; *United States* ex rel. *Tucker* v. *Seaman*, 17 How., 225, 230; *Gaines* v. *Thompson*, 7 Wall., 347; *Litchfield* v. *Register and Receiver*, 9 Wall., 575; *United States* ex rel. *McBride* v. *Schurz*, 102 U. S., 378; *United States* ex rel. *Dunlap* v. *Black*, 128 U. S., 40, 48; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S., 316, 324.)

The purpose of that suit was to compel the Secretary to accept an application to purchase under the timber and stone act. If the relator were right in his construction of the law, the Secretary was violating his duty in rejecting the application. The court held that it could not interfere with the Secretary's decision or compel him to substitute their views of the law for his.

So here; for 50 years the matter of this Baca Float claim has been, in one phase or another, before the department, presenting the question as to whether a

relocation might be permitted, which particular location was the only one to be considered, whether the cost of survey should be borne by the claimants, whether certain conflicting grants were to be excluded, and finally whether title passed at this or some other stage of the proceedings, or at all. The parties were fully heard and the Secretary decided. Can a court directly and immediately review the ground traversed by the Secretary, arrive at a different conclusion, and direct in effect the substitution of its views or conclusion, law or fact, for those of the Secretary?

The Secretary says that the act of June 21, 1860, as he construes it, requires something more than the mere ordering of a survey to convey title to land selected by the heirs of Baca. The instructions issued to carry the law into effect provided for the furnishing of evidence as to the character of the land. The beneficiaries of the act were not privileged to take land where and when they pleased, or to take land of any character. They were limited to vacant land, and that land must not be mineral in character. Before title passes some one must determine whether the land was of the character the heirs were enabled to select. 'Twas a question of fact. To decide, it goes without saying, the adjudicating parties—the surveyor general, in the first instance—must, perforce, have evidence upon which to predicate a decision. In this case we have a surveyor general, in 1864, declining to certify as to the character of the

land, saying that those matters could be determined only upon examination in the field upon survey. We have a commissioner, April 9, 1864, ordering a survey—undoubtedly to give effect to the sensible advice of the surveyor general. Whatever Commissioner Edmunds did on April 9, 1864, it is absolutely certain that he did not adjudicate the character of the land, for he had not a scintilla of evidence before him.

When finally a survey was made, the surveyor general presented evidence to his superior officer—the Commissioner of the General Land Office—evidence *prima facie* showing that the land was not such as the heirs of Baca were entitled to select. For the first time evidence comes into the case, and for the first time the surveyor general and the Commissioner of the General Land Office passed upon evidence. The Secretary affirmed the action of the commissioner. He adopted the view of the law as stated and ordered a hearing upon the facts.

The court below passed upon the merits of the case, adopted a construction of the law contrary to that of the Secretary, and reached a conclusion in reversal of the Secretary's decision.

The case of *U. S.* ex rel. *McKenzie* v. *Fisher* (39 App. D. C., 7) did not involve the proviso to section 7 of the act of March 3, 1891, but was decided on the principle controlling in cases that involve it. McKenzie tried to enter land under a soldiers' additional right. The department ruled that he had no

such right because the base, on which it was predicated, was land not belonging to the United States. McKenzie's position was that the Land Department years ago decided otherwise, that his rights became vested, and that it was *ultra vires* for the Secretary now to presume to go into the question. The court held that it could not review the decision of the Secretary in that respect in mandamus. So McKenzie went back to the lower court and filed a bill in equity. This case reached the Court of Appeals and was decided February 25, 1913. (*McKenzie* v. *Fisher*, 41 Wash. Law Rep., 197.) The Secretary decided that Godsmark's entry (McKenzie claimed a soldiers' additional right predicated on Godsmark's entry) was not on land of the United States, but on land belonging to the State of Michigan. Thus we see that in that case, as in this, we have to deal with a Secretary's decision as to title to land, whether certain land at a certain time belonged to the United States or to some one else; just as here we have the question whether the title to the land claimed by plaintiffs is in the United States or in them. The court held that it was for the Secretary to decide; that he had decided; and that whether his decision was right or wrong was not a matter for judicial inquiry in that form of action.

The case is not at all unlike the one at bar. If Godsmark's entry had been on Government land (and in that case it so happened that in 1877 the Land Department patented the land covered by the entry,

then regarding it as a part of the public domain), Godsmark had a soldiers' additional right, McKenzie owned it, and the Secretary was bound under the law to permit McKenzie to exercise it; but the Secretary passed on the question of title and the court could not review him. So here the Secretary has passed on the question of title, the question on which appellee's case depends, and, we submit, he may not be reviewed and reversed unless he has acted arbitrarily or capriciously.

The decision in the *Grand Rapids Timber Co.* case was followed by others on all fours in principle; and in every case the doctrine laid down in the *Grand Rapids* case was adhered to. *U. S.* ex rel. *Champion Lumber Co.* v. *Fisher* (39 App. D. C., 158); *U. S.* ex rel. *McManus* v. *Fisher* (39 App. D. C., 176); *U. S.* ex rel. *Red River Lumber Co.* v. *Fisher* (39 App. D. C., 181). In the *McManus* case a former Secretary had decided that the entry involved had been *confirmed;* wherefore he would not permit a contest. Now, if that were so—i. e., if the entry had been confirmed—*all title* of the United States passed to the entryman. But a later Secretary, exercising jurisdiction because no patent had issued, decided contrariwise and held that his jurisdiction continued because there had been a lawful protest filed. The court could not review him.

In the *Red River Lumber Co.* case all that appeared resembling a protest was merely a letter from the Commissioner of the General Land Office calling at-

tention to certain statements made in the entryman's final proof and stating that the office desired an investigation to be made. The court said:

> The sole question presented turns upon the interpretation placed upon the act of Congress by the Secretary of the Interior. It is manifest that in the disposition of the case he was called upon to interpret the statute. That he may have wrongfully construed it will not authorize the issuance of the writ.

It was for the Secretary to determine; his construction was a possible one (i. e., it was neither arbitrary nor capricious), and he could not be reviewed.

So here the Secretary is called upon to interpret an act of Congress and to decide by what act and in what method title passes. He may be wrong, but he can not be reviewed in this form of action. In other words, he may not be compelled to perform an act which will pass title, according to his view of the law, when, according to his decision, the proceeding to establish any title that may be in these appellees is yet *in fieri* in his forum, any more than, in the proviso cases, he could be compelled to issue patent and thus foreclose his jurisdiction.

The latter was exactly the situation in the *Champion Lumber Co.* case. That company was cited to the department's bar on charges affecting the validity of the entry, just as in this case appellees are called upon to answer the charges of the surveyor general affecting the validity of their selection. But in the

Champion case the company came in, exactly as they did in the *Baca Float* case, and challenged the jurisdiction of the Secretary. They moved for a stay of proceedings on the ground that the Secretary had no jurisdiction, there not having been a lawful protest filed within two years, just as here the plaintiffs are claiming that the Secretary has no jurisdiction to bring them to bar on a question of the validity of their selection, because a certain act passed title to them years ago. The Secretary in the *Champion* case decided he had jurisdiction because he found and determined that there had been, according to his construction of the statute, a protest. The court held that he could not be reviewed, directly, on that point.

Now, if the court had held contrariwise, as the court below erroneously did in the case at bar, the Secretary would have been obliged to deliver to relator the muniment of the title which he had acquired under his theory of the law, the Secretary's jurisdiction would have been terminated, and the United States would have lost its land.

It will not do to say that in these cases the court merely refused to review the Secretary in a matter that ordinarily would come within his jurisdiction because it relates to a phase of land law. The decisions go beyond that and sustain the Secretary's jurisdiction and the Secretary's right to determine his jurisdiction, which was the point challenged by the relators in all instances. That is, they all conceded that within two years the Secretary might

adjudicate and cancel any entry; but after two years his jurisdiction ceased, because title passed if no protest was pending. So whether there was a passing of title, because there was no protest under a proper construction of the statute, was for the courts, they thought. In other words, the courts could determine, on the record, that under a proper construction of the statute title had passed and the Secretary's efforts to cancel the entry were *ultra vires*.

And the Court of Appeals held otherwise.

We have cited, with comment at some length, decision of the Court of Appeals strangely at variance with their decision in this case; decisions which, the court will observe, were ignored in their decision.

An effort was made to get the *Champion Lumber Co.* case into the Supreme Court on writ of error to the Court of Appeals. The petition was denied February 24, 1913, in an opinion by Mr. Justice Day. (227 U. S., 445.) The proposition was that the lumber company was the owner of the land through statutory confirmation; that the only authority left in the Land Department was to issue a patent; that the ruling that there was a protest, whereby the department attempted to assert jurisdiction, was an attempted determination of its own jurisdiction; and that the court has power to inquire into the jurisdiction of the Land Department and restrain the department if it find that the latter has wrongly assumed jurisdiction; hence that the validity of an authority or the existence or extent of the authority or the duty

of an officer of the United States was drawn in question. The court said that this was not so. "The petitioner's real attack upon the action of the Secretary and commissioner was because the facts shown did not warrant the exercise of the power given by law." The net effect is that the Secretary has jurisdiction to decide when and where, in a public-land case, he has jurisdiction, and his decision is not reviewable in any direct attack. *Kirwan* v. *Murphy*, *supra*, is to the same conclusive effect.

RECAPITULATION.

In conclusion, briefly to summarize the points that appear to us to be controlling, it is respectfully submitted:

(1) That the Secretary is right on the merits of the case, i. e., that under the only admissible construction of the act of June 21, 1860, title to the land selected by the heirs of Baca can not pass unless and until there has been a determination by the proper officers that the land was such as the act authorized the heirs to take, and a survey thereof duly approved by the proper officers in order to locate the "float" and officially to segregate it from the rest of the public domain.

(2) That Clark, the surveyor general of New Mexico, was without any authority to act at any time between February 24, 1863, and July 2, 1864, with respect to any selection of land within the Territory of Arizona.

(3) That even if Clark had authority to act in respect to this selection, he never passed upon the

character or status of the land selected, but, on the contrary, expressly refused to make a finding or report.

(4) That the evidence shows that the Commissioner of the General Land Office, when he wrote the letter of April 9, 1864, was without information as to the character of the land and could not, and did not attempt to, determine its character, approve the selection, or convey the title, or to do aught save order a survey pursuant to the suggestion of Clark, who had just reported that the character of the land could not be determined until after survey and examination.

(5) That Watts, the attorney of the selector, himself confessed that the land selected had not been examined by the selectors and was not what they had intended to take, and alleged successors in interest have admitted that the land was not such as the heirs were entitled to select.

(6) That the Government survey of 1905, and the report of the surveyor general thereon, charges fraud in the selection, and nowhere in their bill have appellees negatived these charges; nor have they alleged that the land selected by Watts on June 17, 1863, was land of the character such as the granting act authorized the heirs of Baca to select.

(7) That these charges raise grave questions which it is the duty of the Secretary to investigate and determine preliminary to taking the final act of rejecting the selection as a whole or in approving it as to parts.

(8) That the existing Calabazas, Tumacacori, and Sonoita claims, none of which had been confirmed or rejected at the date of selection of Baca Float No. 3, reserved the land, so far as they were in conflict with the selection of June 17, 1863, and rendered the same to that extent nonvacant land such as the heirs of Baca were not permitted to take.

(9) That the decisions of the Land Department upon these points were made in the exercise of jurisdiction involving judicial discretion, without caprice or arbitrariness; that the decisions present constructions of the law that are reasonable, at least possible, constructions; and that, right or wrong, the appellants can not be reviewed by the courts in a direct proceeding such as in the case at bar.

(10) That furthermore the appellees have not shown in any of them title sufficient to maintain this suit.

(11) That the courts of the District of Columbia have no jurisdiction in a proceeding to try title or quiet title to land situate in the State of Arizona; land to which for 50 years the United States has claimed title and has been in possession thereof, either directly or through claimants under the public-land laws, acting under the authority of those laws and of the Land Department.

(12) And that in any event the question as to whether title passed in 1864 is an issue solely between the appellees on one side and the United States on the other, which the court is without jurisdiction to

determine, because the United States is not, and can not be made, a party.

We respectfully submit that the judgment below should be reversed and the case remanded with direction to dismiss the bill.

PRESTON C. WEST,
Assistant Attorney General,
C. EDWARD WRIGHT,
Assistant Attorney,
Attorneys for Appellants.

[redacted]

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, *et al.*, appellants,
v.
CORNELIUS C. WATTS *et al.*
No. 889.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

ADDITIONAL BRIEF FOR APPELLANTS.

The appellants, it is submitted, are clearly entitled to an appeal under either and all of the first, fifth, and sixth paragraphs or clauses of section 250 of the Judicial Code. The action of the Court of Appeals in granting the appeal was right.

I.

This case is reviewable by the Supreme Court because the jurisdiction of the trial court was in issue. (Clause 1, section 250.)

We are not quite able to grasp the argument at pages 12 and 13 of brief on behalf of appellees Cornelius C. Watts and Davis that no issue was properly

raised as to the jurisdiction of the trial court. All the matter presented goes solely to the point that on the question of jurisdiction the trial court rightly decided. We really did not expect any admission to the contrary from appellees, and we understand very clearly that they will continue so to contend. On the other hand, we are no less earnest in our contention that such decision was wrong. Surely this is an issue as to the jurisdiction—surely it needs no argument to demonstrate that it was both *raised* and *decided* by the trial court. Should it so fall out that this court agrees with the trial court on these propositions (heaven save the mark!), we are none the less entitled to have *this court's* judgment and pronouncement thereon and to that end to prosecute this appeal.

There was, in *Plested* v. *Abbey* (228 U. S., 42), a public land case, a decision adverse to jurisdiction by the trial court. In this case the court sustains its jurisdiction. In either event, a jurisdictional question is presented and should be reviewed by the Supreme Court.

If the court thinks that its jurisdiction depends upon whether or not title passed out of the United States, and that its decision on that point eliminates the question of jurisdiction, then we submit that the jurisdiction of the trial court is in issue on another ground: Had it jurisdiction to pass upon the question as to whether title to land in Arizona was in or out of the United States and in the absence of the United States as a party to the suit? While the Court of

Appeals was silent on those points, two of the contentions advanced by the appellants, the court's decision necessarily assumes jurisdiction. We are entitled to review on appeal on that point.

The demurrer challenged the jurisdiction of the trial court. The trial court decided that it had jurisdiction and authority to enjoin. (Record, p. 309.) The decree proceeds upon that theory. The assignment of errors in the Court of Appeals raised these jurisdictional points, but the Court of Appeals nevertheless affirmed the decree of the trial court.

The proposition, we think, is so plain that more extended argument would only be an imposition upon the court's time.

II.

The validity of an authority exercised under the United States or the existence or scope of any power or duty of an officer of the United States is drawn in question.

The decision in *United States* ex rel. *Champion Lumber Company* v. *Fisher* (227 U. S., 445) is not an authority for any contrary view. The court held that clause 5 of said section 250 did not apply to that case because it turned upon the existence of the *fact* whether or not there was a "protest" in that case. The Secretary had held that there was a protest. The Supreme Court of the District and the Court of Appeals held that his decision was within his jurisdiction and was not reviewable by the court in the absence of arbitrariness or caprice on the Secretary's

part. The Supreme Court recognized that it was too clear for argument that the Secretary *ex necessitate* was vested with the function of construing the confirmation act and determining whether or not any particular paper or proceeding in a case before him constituted a protest within the meaning of that statute, and that the only question presented was whether he had decided rightly; that is, the case presented only the question of proper exercise or performance of, and not the validity, existence, or scope of, authority, power or duty in the premises.

But in the case at bar it is otherwise. There is no dispute about what was done on April 9, 1864. A letter was written by the Commissioner of the General Land Office. If that letter could effect *in law* all that was required by a proper construction of the act of June 21, 1860, to pass title to the selected land, the result would be one thing; if otherwise, the result would be different. In the one the Secretary might have become *functus officio;* in the other he clearly would have retained power and duty to perform further acts. The validity of his authority and the existence of the scope of his further power and duty are all involved, depending not upon whether some *fact* exists or does not exist, but upon the *construction* of a *Federal statute.* We can go as far as to assume that the letter of April 9, 1864, was intended as a conveyance of title, and yet have remaining the question, "Could it in law have operated as a conveyance—didn't the granting act of June 21,

1860, require something more?" On that may depend the existence of the Secretary's power. The scope of that power and his duty remains. The Court of Appeals, failing to agree with the defense's construction of the law, held that he, the appellant, was left with only a ministerial duty to perform.

We contended that he still had power and authority, and that it was his duty to determine whether or not, under the act of 1860, the letter of April 9, 1864, did or could pass the legal title, and having decided that it did not and could not, then to pass upon the character of the selected land, and that it was within the scope of that power to order the hearing before the surveyor general on the character of the land, before it might become his duty, after the exercise of his judicial discretion, either to pass title to the claimants or to reject finally the selection.

The application of the fifth clause presents itself in many other ways. If Commissioner Edmunds intended to convey title, did he have authority under the act of June 21, 1860, to pass it prior to "location" and resulting segregation from the public domain by the surveyor general? Did the surveyor general of New Mexico have any power to act upon the selection, one way or the other, when in fact the land was situated within the jurisdiction of another surveyor general? Had the surveyor general of Arizona in 1905, when survey was actually made, any power or duty in the premises, and what

was its scope? All these questions are necessarily—specifically in one instance—passed upon by the court, whose decision in effect is to deny the existence of other than merely ministerial power or duty.

But, broadly, we contend, in all cases where the validity of any authority exercised by a Federal officer or where the existence of his power or duty to do the thing which is sought to be controlled is denied by the court—necessarily denied before the court can take jurisdiction—or where the court attempts to define and limit the scope of his power and duty in derogation of the authority sought to be exercised by the Federal officer—that being the essence of his case—his defense: in all such cases the Federal officer has a right to review by the Supreme Court of the court's decision.

III.

The construction of a Federal statute was drawn in question by the appellants—defendants below.

Whatever rights appellees ever, if ever, acquired in the land involved were acquired under the act of June 21, 1860—the act granting the right to select. Ordinarily title passes by patent or by some specific act provided in the grant. This act, however, was silent in expression of the precise mode in which legal title was to pass. The claimants in their trial of the cause before the department contended that, under their construction of the statute, title passed at one of three points. All this is discussed in appellant's brief, page 23 *et seq.* The Secretary decided against

the claimants, holding that under his construction of the act title could not pass save at a fourth point.

The appellants contended in the department and before the courts and the trial court, and the Court of Appeals decided, that under said act of June 21, 1860, title could and did pass out of the United States April 9, 1864, by the action of the Commissioner of the General Land Office; whereas, on the other hand, the Secretary decided that the final act by which title passed under said act was the acceptance and filing of an approved plat and the field notes of a survey whereby the surveyor general made "location" of the selection, reporting the land to be non-mineral and vacant; and the appellant, defendant below, advanced and relied upon this construction in the court.

This was the *crux* of the case in the view of the Court of Appeals. In its opinion it said (Record, at p. 346):

> Appellants contend that the title to this land was not to pass from the United States to the heirs of Baca unless and until the Surveyor General should survey and examine the same and report to the Department that such survey and examination disclosed that the land was vacant and not mineral June 17, 1863. Appellees insist, on the other hand, and the court below adopted their view, that the title to this land passed out of the United States and vested in the heirs of Baca on April 9, 1864.

The court thereupon proceeded to adjudicate that issue.

If the Court of Appeals be right in the view taken as to how and when title could pass to a selection made under the act of June 21, 1860, one situation is presented.

On the other hand, if the appellants, defendants below, are right in their view—that title can not pass "unless and until" the surveyor general should survey and examine—i. e., make the technical, the legal "location" directed by the act—then the decision of the court is wrong. For, it would follow, the matter would still be *in fieri* in the department, and the Secretary would retain jurisdiction.

In what plainer way could the construction of a law of the United States be drawn in question by the defendant?

To recapitulate: We are entitled to a review by this court on appeal because:

(1) The construction of an act of Congress was drawn in question by the defendant Secretary and his construction, which if it had been adopted by the court would have necessarily resulted in the dismissal of the bill, was in effect reversed by the courts below, as if the case were on appeal from the Secretary and another construction adopted.

In addition to what has already been said on this point, attention is called to the last paragraph on page 350 of the record, wherein the Court of Appeals, in its opinion, stated that while the *act* of June 21,

1860, contemplates a survey, yet when the Land Office had acted—i. e., in the way it acted in this case—"title became absolutely confirmed in the heirs of Baca." That is exactly what defendants contended could not happen—that the proper construction of the act did not permit passing of title until *after* survey and upon filing of an approved plat and field notes.

The position of the Court of Appeals and the trial court is wholly untenable if the appellant be correct in his construction of the act of June 21, 1860. It makes no difference what the Commissioner of the General Land Office did on April 9, 1864, or what he intended to do—even if he had said "I hereby convey title out of the United States, not caring a fig whether the land is mineral or otherwise;" for, under a proper construction of the granting act, there could be no passing of title "unless and until" the Surveyor General had made "location" as decided by the Secretary (see Record, pp. 120, 136; answer, pp. 90 and 106).

Upon the point whether the court or the defendant is correct in the construction that is advanced this case is, we think, reviewable by the Supreme Court under the sixth clause of section 250 of the Judicial Code.

Moreover, it is not the act of June 21, 1860, alone that was passed upon by the court. The Court of Appeals adopted a construction of the act of June 22, 1854, contrary to the construction relied upon by the defendants. It held that claims did not become *sub*

judice until they were filed. The appellants contended that the lands covered by these claims under that act were at all times reserved from appropriation until disposed of.

Furthermore, and contrary to the construction given to acts of Congress by the appellants, the Court of Appeals ruled that the Land Office was in error in requiring deposit of the estimated cost of survey as a prerequisite to making it for and on behalf of the claimants.

(2) The validity of the appellants' authority and existence and scope of their power and duty, drawn in question by the suit, were passed upon by the court, whose decision denies that authority as exercised by the Secretary in this case and limits his power merely to perform what the court rules to be his duty—a mere ministerial duty; whereas the Secretary claims that he has full authority to do all that plaintiffs sought to restrain and to forbear doing what they sought to have him compelled to do.

The Secretary is the minister of the Chief Executive. Can any judicial tribunal short of the Supreme Court of the United States finally deny the validity of an authority exercised by him or the existence of a power exercised by him?

(3) The jurisdiction of the trial court was in issue.

There is no doubt of the right of appeal; but if any doubt existed surely the magnitude of interests involved, the multitude of persons to be affected,

and the necessity for a final and authoritative determination of the questions involved, would fully warrant resolving such doubts in favor of review by this court.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 889.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, APPELLANTS,

vs.

CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., JOHN WATTS, AND JAMES W. VROOM.

BRIEF OF WILLIAM C. PRENTISS.

WILLIAM C. PRENTISS.

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BRIEF OF WILLIAM C. PRENTISS.

This brief is submitted in support of two propositions which go to the merits of the controversy while at the same time accentuating the jurisdictional questions which should dispose of the case. The questions here considered are:

I. The area covered by the Tumacacori and Calabasas claim was in statutory reservation in 1863 and 1864, so that the Land Department was without jurisdiction to dispose of it.

II. That the action of the Commissioner of the General Land Office in ordering survey in 1864 was not intended or

understood as operating to, and it did not, and could not, in fact or law, pass to the heirs of Baca the legal title to the land attempted to be selected in 1863 as Baca Float No. 3.

Statutory Reservation.

The Tumacacori and Calabasas claim (the subject of decision by this court in Faxon *vs.* U. S., 171 U. S., 220), embraced about 28,000 acres of the tract in controversy, taking in nearly all of the valley of the Santa Cruz River. (See map in record, opposite page 276.) This area comprises nearly all of the irrigable and agricultural portion of the land in controversy, and within it are situated the homestead entry of Henry Ohm, and many others.

In Faxon *vs.* U. S., *supra*, it appears that Gandara, transferee of the original purchaser of the Tumacacori and Calabasas claim from Mexico, was in possession of the land at the time of the Gadsden purchase, and with the report of Surveyor-General Ingalls (record herein, pages 255, 263, 264) there was returned evidence that Gandara, who had been Governor of Sonora and was a very distinguished citizen, soldier and statesman, had, from the time of the Gadsden purchase and many years afterwards, and before resided a large portion of the time on this Tumacacori and Calabasas grant; that he had a large hacienda, composed of many buildings and corrals, land in cultivation, and a large retinue of soldiers and servants, forming quite a village and settlement, and large herds of sheep and cattle and factories for the manufacture of wool into fabric, and that the hacienda was so occupied and claimed in June, 1863, and continued to be for years after.

It is evident, therefore, that the area embraced in this private land claim was not "vacant" land subject to selection by the heirs of Baca, but was land occupied and claimed under muniment of title of record in the official public records of the State of Sonora. (See Faxon *vs.* U. S., *supra.*)

This area was not only occupied and claimed, and in that

sense not vacant, but it was in statutory reservation by virtue of the legislation of Congress following and designed to carry out the provisions of the treaties of Guadaloupe Hidalgo and Mesilla, the latter being known as the Gadsden purchase.

By article VIII of the treaty of Guadaloupe Hidalgo, July 4, 1848, it was provided that the property of Mexicans in the territory ceded by Mexico to United States was to be "inviolably respected," and they and their heirs and grantees were "to enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States" (9 Stat. at L., 929, 930).

By act of September 9, 1850 (Stat. at L., 446), the Territory of New Mexico was created, provision being made for a governor, secretary, legislative assembly, judiciary, U. S. attorney, marshal, and a delegate to the House of Representatives, but not for a surveyor-general.

By the act of July 22, 1854 (10 Stat., 308), the office of surveyor-general of New Mexico was created, and by section 8 provision was made for carrying out the guaranties of the treaty of Guadaloupe Hidalgo in respect to the property of Mexicans, as follows:

> "That it shall be the duty of the surveyor-general, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico; and, for this purpose, may issue notices, summons witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadaloupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages and customs of the country before its cession to the United States; * * * Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for

> such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the Government, and shall not be subject to the donations granted by the previous provisions of this act."

By article I of the treaty of Mesilla, December 30, 1853 (10 Stat., 1035), Mexico had ceded to the United States the land known as the Gadsden purchase, and by Article V of that treaty it was declared that articles VIII and IX of the treaty of Guadaloupe Hidalgo "shall apply to the territory ceded by the Mexican Republic by the first article of the present treaty, and to all the rights of persons and property," as though the same were again recited and fully set forth.

By act of August 4, 1854 (10 Stat., 575), it was provided:

> "That, until otherwise provided by law, the territory acquired under the late treaty with Mexico, commonly known as the Gadsden treaty, be, and the same is hereby incorporated with the Territory of 'New Mexico,' subject to all the laws of the last-named Territory."

By act of February 24, 1863 (12 Stat., 664), the Territory of Arizona was created and carved out of that of New Mexico, and there was included in the newly created Territory of Arizona the western half of the Gadsden purchase, in which half lies the Tumacacori and Calabasas grant and the whole of Baca Float No. 3. The second section of the act provided for the appointment of a surveyer-general and other officers. It was further provided that the "powers, duties and the compensation" of said officers—

> "* * * shall be such as are conferred upon the same officers by the act organizing the territorial government of New Mexico, which subordinate officers

> shall be appointed in the same manner and not exceed those created by said act; and acts amendatory thereto, together with all legislative enactments of the Territory of New Mexico, not in conflict with the provisions of this act, are hereby extended and continued in force in the said Territory of Arizona until repealed or amended by future legislation."

By the civil appropriation bill of July 2, 1864 (13 Stat., 344-352), it was enacted:

> "That until otherwise directed by law the Territory of New Mexico and the Territory of Arizona shall constitute one surveyor-general's district."

By act of July 11, 1870 (16 Stat., 230), it is declared that the Territory of Arizona is created a separate surveying district and that the surveyor-general's duties shall be the same as those provided by law for the surveyor-general of Oregon.

On July 15, 1870, four days after the passage of the act of July 11, 1870 (16 Stat., 291, 304), it is provided:

> "That it shall be the duty of the surveyor-general of Arizona, under such instructions as may be given by the Secretary of the Interior, to ascertain and report upon the origin, nature, character and extent of the claims to lands in said Territory under the laws, usages and customs of Spain and Mexico; and for this purpose he shall have the powers conferred, and shall perform all the duties enjoined upon the surveyor-general of New Mexico by the 8th section of an act entitled 'An act to establish the offices of surveyor-general of New Mexico, Kansas, Nebraska, and so forth,' approved July 22, 1854, and his report shall be laid before Congress for such action thereon as shall be deemed just and proper."

The Land Department and the courts have uniformly construed the recited legislation to the effect that section eight of the act of July 22, 1854, *was extended to the Gadsden purchase by the act of August* 4, 1854, *supra.*

In a decision dated February 17, 1872, the Secretary of the Interior held that the laws referred to in the act of August 4, 1854, were United States laws, including the act of July 22, 1854, and hence that the jurisdiction of the surveyor-general of New Mexico, with respect to Mexican private land claims, extended over all of the territory acquired by the Gadsden treaty (Public Domain, 1883, page 408).

Secretary Smith, May 8, 1893 (16 L. D., 408), in construing the legislation above set forth, says:

> "It is insisted that the act of 1854, *supra*, by its terms, is restricted to private land claims within the limits of the cession by the treaty of Guadaloupe Hidalgo, and therefore is not applicable to the lands within the Gadsden purchase. I do not so read the law, but am satisfied, upon a review of the recited legislation, Congress intended that said acts were to be construed together as part of one system or method to be followed in relation to the private land grants within the two territories named; and that it was intended said system should be applicable alike to such grants or claims therein, whether the lands covered by them were ceded by the one treaty or the other.
>
> "Congress having full power to legislate on this subject, I can imagine no reason why it should direct that lands derived under the older treaty should be placed in reservation and protected, pending investigation, and those which were ceded under the younger treaty should be thrown open to entry or settlers encouraged to go upon them. The stipulations as to the protection of private property in both treaties are identical, those of the first having been adopted in the second. But, independent of any such treaty stipulations, the obligation of the Government, under the laws recognized by all civilized nations, to protect private property, is as imperative in the one case as in the other. If the rule claimed by your predecessor be the correct one, the anomalous condition of affairs would be presented of Congress directing that grants of the same kind, from the same source, in the northern portion of a Territory, should be dealt with by one rule, whilst those in the southern portion

thereof should be dealt with, by the same officer, under a different rule; the claims in one place to be protected from intruders by a reservation, and in the other place to be left defenceless. It is not believed that it was intended to enact law to produce a condition so incongruous, so unjust, and so calculated to create confusion.

"In considering this question, it should also be borne in mind that at the time the act of 1854 was passed, the Gadsden treaty of December 30, 1853, had been ratified and proclaimed, wherein the provisions of the treaty of Guadaloupe, in relation to the protection to be extended to claimants under Mexican and Spanish grants, had been specially referred to and adopted. Unless an expression, or a strong implication to that effect can be found, it would be an unwarranted assumption to hold that Congress, legislating to carry out existing treaty obligations in relation to grants in the territory ceded by Mexico should utterly ignore one treaty and so restrict its legislation that no action could be taken in relation to the claimed land in one of the cessions. On the contrary, it would seem that every presumption ought to be the other way. And this presumption is strengthened when it is recollected that the two cessions were of adjacent and contiguous territory, the last cession being but a supplement to the first, obtained professedly for the purpose of making it more complete and satisfactory, of straightening and otherwise improving its boundaries.

"In view of these circumstances, part of the history of the times, it is fair to assume, in the absence of expression or clear implication to the contrary, that the legislation referred to was intended to be broad enough to cover the lands within both cessions. Indeed, Congress seems to have left but little room for doubt as to its purpose in this respect, for in a few days thereafter, by act of August 4, 1854, *supra*, it specifically placed all the lands acquired by the Gadsden treaty within the limits of New Mexico, declaring they should be subject to 'all' its laws. This brief but comprehensive act may be fairly regarded as a legislative declaration that the laws of New Mexico

contained ample provisions for the protection of the public and private interests in the lands thus added to its territory.

"It is my opinion, then, that the lands within the Gadsden purchase became subject to the provisions of section 8 of the act of July 22, 1854, after the passage of the act of August 4, 1854, when said lands were incorporated with the Territory of New Mexico.

"But it is insisted that even if it be true that the provisions of the act of July 22, 1854, were extended to private grants located on the Gadsden purchase within the Territory of New Mexico, yet the provisions of said section ceased to be applicable thereto within Arizona when it was organized into a separate Territory. This position is not tenable, in my opinion.

"In the second section of the act of February, 1863, *supra*, organizing the Territory of Arizona, which Congress well knew was to include within its limits lands obtained under both treaties, it is declared that acts amendatory to the act organizing the Territory of New Mexico, not inconsistent, shall be 'extended to and continued in force' in the new Territory 'until repealed or amended by future legislation.' The act of July 22, 1854, *supra*, was amendatory to the act of 1850 organizing the Territory of New Mexico, inasmuch as in the said eighth section for the first time steps were taken to organize the land system therein by the appointment of a surveyor-general, and, as has just been said, it was applicable to and operative over all parts of New Mexico, including that portion carved out of it and organized as Arizona.

"The language of the act of 1863, *supra*, seems to make it so plain as to admit of no argument to the contrary that section 8 of the act of July 22, 1854, was 'extended to and continued in force' over the whole of Arizona, 'until repealed or amended' by later legislation. Where is the later legislation which has repealed or amended this mandate? Not in section 8 of the appropriation bill of 1864, *supra*, for that is rather confirmatory inasmuch as it declares that New Mexico and Arizona shall constitute one surveying district, and presumably with one system

of laws; not in the subsequent act of 1867, *supra*, whereby Arizona was temporarily 'attached' to the surveying district of California. This last act contains no express repeal of the laws theretofore 'continued in force' over Arizona, nor anything from which an intention to repeal or modify them can properly be implied. The language of the last act is different from that of the act whereby New Mexico and Arizona are made to 'constitute one surveyor general's district;' that is, each of these territories is to be a constituent or essential part of the one district. In the last case, Arizona, as organized, with all the laws which have been 'extended' over it, is simply 'attached' temporarily to the surveying district of California and it thus became the duty of the surveyor of that State to administer his office in the attached territory, under the particular laws applicable thereto, and not under those applicable to the public lands or private claims in California.

"All this is made the more plain by reference to the subsequent legislation contained in the acts of July 11 and 15, 1870, *supra*, whereby Arizona was made a separate surveying district, and the instructions to the surveyor general therein, in relation to Spanish and Mexican grants were, perhaps, out of abundant caution, repeated, as declaring the law.

"It is my opinion, therefore, that the provisions of section 8 of the act of July 22, 1854, having been extended to the lands within the Gadsden purchase by the act of August 4, 1854, were 'continued in force' over the same by the act of 1863, and are yet in force and applicable to private land claims in Arizona, unless 'repealed' or 'amended' by subsequent legislation, either expressly or by clear implication.

"The fact that the clause, providing for a reservation of the lands claimed and reported upon, is omitted from the proviso in the appropriation bill of July 15, 1870, which undertakes to define the duty of the surveyor general in Arizona, does not militate against these views. There is no conflict between section 8 of the act of 1854 and this last proviso. It is not necessary to hold that the last repeals the

reservation clause of the former. Both laws can stand together and be enforced, for they both seek the same end, attaching to the same subject, within the same territory. The canons of construction imperatively require that they should be read together as part of one system.

"The rulings of the Land Department and its practice in the administration of the laws relating to these grants are in harmony with the opinion which I have expressed.

"On August 25, 1854, when New Mexico included Arizona as well as all the lands of the Gadsden purchase, the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, issued a letter of instructions to the surveyor general of New Mexico prescribing rules for his guidance in proceedings relating to private grants under section 8 of the act of 1854, *supra*. In these instructions there is nothing to indicate that they and said act do not apply to all the lands within the limits of New Mexico then under his jurisdiction. (See Public Domain, p. 394.)

"In 1872 the surveyor general of New Mexico seemed to have some doubt as to his power to report upon private land claims within the Gadsden purchase, and your office submitted the matter to the Secretary (Mr. Delano), who, on February 17, 1872, decided that section 8 of the act of 1854 was made applicable, by act of August 4, 1854, to all the territory acquired by the Gadsden purchase, but the surveyor general of New Mexico could only report on private land claims within that part of the Gadsden purchase not incorporated in the Territory of Arizona (Copp's Land Laws, p. 601).

"In the Land Office report of 1877, on page 26, Commissioner Williamson says that by the—

" 'Act of July 15, 1870 (16 Stat., p. 304), the provisions of the eighth section of the act of July 22, 1854, were extended to Arizona, and the surveyor general thereof was thereby clothed with as ample jurisdiction over the grants therein as was vested in the surveyor general of New Mexico over like claims in the Territory of New Mexico.'

"On January 16, 1877, with the approval of the Secretary of the Interior, the Commissioner of the General Land Office issued instructions to the surveyor general of Arizona directing him to proceed in compliance with the requirements of said act of July 22, 1854, and supplemental legislation, to report to Congress the origin, nature, and extent of all private land claims within his district (*ib.*, p. 27). In said instructions, the Commissioner, reciting that part of the act of July 15, 1870, *supra*, which confers upon the surveyor general of Arizona all the powers, and imposes the duties enjoined upon the surveyor general of New Mexico, by the act of July 22, 1854, quotes at length section 8 thereof as defining said powers and duties, and copies almost verbatim the instructions theretofore given to the surveyor general of New Mexico under said act. In the instructions to both officers, they are directed to require from every claimant an authenticated plat of survey or other evidence showing the precise locality and extent of the tract claimed. The directions then state:

" 'This is indispensable in order to avoid any doubt hereafter in reserving from sale as contemplated by law the particular tract or parcel of land for which claim may be duly filed, etc. (Pub. Dom., *supra*, Letter Book Priv. Land Claims, vol. 33).

"The directions were repeated substantially by Commissioner McFarland to the surveyor-general of Arizona in the matter of the Ranchos de Las Algodones (1 L. D., 166), and of the Rancho San Juan de Las Boguilas (*ib.*, 167), both within the Gadsden purchase.

"In 3 L. D. (p. 438), Secretary Teller quotes the reservation clause of section 8 of the act of 1854 as applicable to the private land claim of San Rafael de la Zanja, in Arizona, and also within the Gadsden purchase. On page 439 he said:

" 'There being a claim pending in Congress—which was also presented to the surveyor-general and decided adversely by him—to have a confirmation by the metes and bounds set up by the claimants, it is proper to inquire what lands are reserved by law.

The statute defines them. Until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or disposal by the Government,' etc."

"This case came again before the Department in 4 L. D. (p. 482), when Secretary Lamar affirmed the former ruling, with much emphasis, quoting also the reservation clause of the act of July 22, 1854, as containing the law applicable to the claim. The ruling in the Tres Alamos grant, similarly situated, reported on page 430 of the same volume, is to the same effect. Indeed, in 15 Copp's Land Owner (p. 33), Commissioner Stockslager himself, on April 11, 1888, made a ruling to the same effect in relation to the Peralta claim, a large portion of which covers land within the Gadsden purchase in Arizona. Doubtless there are other decisions to the same effect, but these are sufficient to show the contemporaneous and continued construction of the law by those charged with its execution. A practice and rulings as well settled and uniform as here shown, establishing a rule of property, should not be disregarded. And in this particular case, Commissioner McFarland, on February 20, 1885, in a letter to Hon. W. S. Holman, House of Representatives, stated that your office had examined said claim, that the proceedings were regular, that the claimed land had been properly reserved, and that no reasons appeared why the grant should not be confirmed.

"It is also proper to refer to what seems to be a legislative construction to the same effect by Congress. Neither in its organic act, nor in any other statute is there an express reservation of land for school purposes to Arizona, prior to the adoption of the Revised Statutes. But by the United States Revised Statutes, section 1946, it is expressly declared that sections 16 and 36 in each township in Arizona shall be reserved for school purposes therein. By the act of June 27, 1866 (14 Stat., 74), the commissioners thereby authorized to be appointed to revise the United States Statutes, were required, in section 2, to insert in their revision 'side notes * * * with references to the original text from which each

section is compiled.' In the side note to section 1946 reference is made to section 2 of the act of 1863, *supra*, organizing the Territory of Arizona as reserving the school sections to it. Recurring to that section it shows, as before said, no express school reservation, but a declaration, in rather obscure language, extending the original act of New Mexico, and acts amendatory thereto, over Arizona. Section 15 of the act of September 9, 1850 (9 Stat., 446), organizing the Territory of New Mexico, and section 5 of the act of July 22, 1854, *supra*, both contain a provision reserving the sixteenth and thirty-sixth sections for school purposes in New Mexico.

"Thus the Commissioners of revision, and Congress, by accepting their work and enacting it into law, declared that by said section 2 of the Arizona act the laws of Congress pertaining to New Mexico were fully applicable to Arizona.

"In addition to what has been here said, it may be added that the Supreme Court has recently had before it a case involving the present status of the grant now under consideration. In the case of Astiazaran *vs.* Santa Rita Land and Mining Co., reported in 148 U. S., page 83, a bill was filed in the Arizona court by parties asserting claim to this grant adverse to that of the present holders, and asking to have petitioners' title quieted. The Supreme Court affirmed the judgment of the courts below for the defendant, on the ground that Congress, having constituted itself the particular tribunal to finally determine, upon the report and recommendation of the surveyor-general, whether the claim is valid or invalid whilst proceedings to that end are pending, the question of title cannot be contested in the ordinary courts of justice. And in arriving at this conclusion, the court assumes that the jurisdiction of the surveyor-general of Arizona, in relation to the grant, is conferred and defined by the acts of July 22, 1854, and of July 15, 1870, before cited.

"So also in the recent case of Cameron *vs.* United States, reported in the same volume. The United States instituted proceedings in the District Court of Arizona to compel Cameron to remove a fence

> alleged to enclose a portion of the public lands. The defendant entered a general denial and claimed a right to the land under the Mexican grant for the Rancho San Rafael de la Zanja, which had been reported favorably by the surveyor-general of Arizona, but which was not yet confirmed by Congress. The Supreme Court held that as the possession of the land in question was under color of title, the courts could not interfere until the matter of the grant title had been finally acted upon by the appointed tribunal. In coming to this conclusion, the court expressly decides that, under the legislation of Congress, heretofore cited, the reservation clause in section 8 of the act of July 22, 1854, is applicable to the private grants of Arizona."

Again Secretary Hitchcock, June 30, 1900 (30 L. D., page 97), in a decision approved by the then Assistant Attorney General, reviewed all of the statutes on the subject and held that all claims to lands under Spanish or Mexican grants within the Gadsden purchase were reserved from sale or other disposal by the Government until the final action of Congress thereon. In other words, that section 8 of the act of July 22, 1854, applied to the Gadsden purchase.

The provisions of section 8 of the act of July 22, 1854, as so made applicable to the Gadsden purchase, constituted a statutory reservation of all lands within Mexican private land claims, from any other disposal pending final action by Congress, whether or not the claimants to the land filed a petition for the same with the surveyor general and whether or not the lands claimed constituted a valid grant.

The eighth section of the act of July 22, 1854, does not provide for the filing of a petition by the claimant to lands under a Mexican or Spanish grant. On the other hand, it is made the duty of the surveyor general to investigate such claims to lands and to report his findings upon the same to Congress for final action by it. The Land Department was not called upon to pass upon this question of whether the statute operated by its own force in respect of reservation

without being put into effect by the presentation of a claim to the surveyor general, until after the decision of this court in the case of Cameron *vs.* U. S., 148 U. S., 301, *supra,* which effectually disposed of this question. In Cameron *vs.* U. S., by this court, dealing with a private land claim within the Gadsden purchase, it was said:

> "Speaking of such claims, it was said by Mr. Justice Davis 'that claims, whether grounded upon an inchoate or a perfected title, were to be ascertained and adequately protected. This duty, enjoined by a sense of natural justice and by treaty obligations, could only be discharged by prohibiting intrusion upon the claimed lands until the opportunity was afforded the parties in interest for a judicial hearing and determination. It was to be expected that unfounded and fraudulent claims would be presented for confirmation. There was, in the opinion of Congress, no mode of separating them from those which were valid without investigation by a competent tribunal; and our legislation was so shaped that no title could be initiated under the laws of the United States to lands covered by a Mexican or Spanish claim until it was barred by lapse of time or rejected.'
>
> "It was urged in that case that the reservation could only be of lands 'lawfully' claimed, but it was said expressly that there was no authority to import the word 'lawful' into the statute in order to change its meaning, and that the act in question expressly excluded from preëmption and sale all lands covered by any foreign grant or title. In Doolan *vs.* Carr (125 U. S., 618) it was held that if the grant was of a specific quantity within designated outboundaries containing a greater area, only so much land within the outboundaries as was necessary to cover the specific quantity granted was excluded from the grant to the railroad companies. Indeed, the cases in which these rules have been applied are too numerous even to require citation. In this case there is an express finding that the report of the surveyor-general limiting the grant to 4 square leagues has never been finally

> acted upon by Congress, and that the claim and report are still pending before Congress; in other words, and the claim is *sub judice.*
>
> "It is true that in the act of July 22, 1854 (10 Stat., 308, c. 103), establishing the office of surveyor-general for New Mexico (then including Arizona), there is a provision which is omitted in the act of July 11, 1870 (16 Stat., 230, c. 246), establishing the same office for Arizona, that 'until the final action of Congress on such claims all lands covered thereby shall be reserved from sale or other disposal by the Government and shall not be subject to the donations granted by the previous provisions of this act;' but as the sundry civil appropriation act of that year (16 Stat., 291) provides that the surveyor-general of Arizona shall have all the powers and perform all the duties enjoined upon the surveyor-general of New Mexico, there could have been no intention to change the settled policy of the Government in this particular."

This policy and purpose on the part of Congress in protecting Mexican private land claims could be effective only by operating at once upon all claims of that character and reserving the land until final action by Congress. The lands were reserved, therefore, *eo instanti,* at the passage of the act of July 22, 1854, when said act was extended to the Gadsden purchase, namely, on August 4, 1854. The act by its own vigor reserved the land, and the reservation in nowise depended upon any action or any rule made by the Secretary of the Interior, the Secretary being merely authorized to provide ways and means of obtaining the information desired to enable Congress to act. As the act operated instantaneously, and as it reserved the lands until the final action of Congress thereon, the filing of a petition with the Secretary or the failure to file such a petition could in nowise affect the reservation of the lands from sale or disposal.

In the decision of Secretary Hitchcock of June 30, 1900, heretofore quoted from, it is said:

> "1. Were the lands within the limits of these Mexican grants [Tumacacori and Calabasas] 're-

served from sale or other disposal by the Government,' under the eighth section of the act of July 22, 1854, at the date of the Baca selection or location of July 17, 1863?

"The manifest purpose of the enactment of this legislation was the adoption of a means whereby effective steps might be taken as early as practicable looking to the discharge of the obligations imposed upon the United States, by the treaty of 1848, with respect to property rights of Mexicans within the territory ceded by that treaty. A like purpose is equally manifest with respect to the lands ceded by the treaty of 1853, both in the act of August 4, 1854, whereby such newly-ceded lands were 'incorporated with the Territory of New Mexico, subject to all the laws' of that Territory, and in the later act of February 24, 1863, which extended such legislation to the new Territory of Arizona. It was made 'the duty of the surveyor general,' under instructions from the Secretary of the Interior, 'to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico,' within the ceded territory, and to make full report on all such claims as originated prior to the treaties of 1848 and 1853, which report was to be submitted to Congress for its action with the view to the confirmation of all *bona fide* grants and thus giving effect to the stipulations of said treaties with respect thereto. It was further provided that 'until the final action of Congress on such claims, all lands covered thereby, should be reserved from sale or other disposal by the Government.'

"The matters for investigation and report by the surveyor general were Spanish or Mexican claims to lands, and the reservation for the benefit of such claims was to embrace 'all lands covered thereby.' There is nothing in the act indicative of a purpose on the part of Congress to postpone the effective operation of the reservation in any case to the time of the filing with the surveyor general of a petition for the confirmation of the claim, or to any other time. Indeed, there is no provision requiring the filing of any such petition with the surveyor general or else-

where. The natural and most reasonable interpretation of the language of the statute is that the reservation was to become immediately operative upon all lands within the ceded territory covered at the time by any Spanish or Mexican claim which originated prior to the treaty of cession. The purpose being that the lands should be reserved until final action could be had on the claim, it was quite as necessary that the reservation should be effective for such purpose before as after the commencement of proceedings under the statute by the surveyor general. Otherwise the lands might have been disposed of by the Government before the commencement of such proceedings and thus the very object of the statute would have been defeated.

"It mattered not whether the claim was a valid one. If the lands were covered by a Spanish or Mexican claim they were to be reserved for the very purpose of affording an opportunity of investigating and determining the validity or invalidity of the claim. This investigation was to be made in the first instance by the surveyor general but the action of that officer was not to be final. His report was to be submitted to Congress and there the means of final action were to be provided. To fully meet the purpose of the reservation it was necessary that it should at once become operative whenever and wherever lands were covered by a claim such as the statute describes."

It must follow that the lands within the boundaries of the Tumacacori and Calabasas Mexican grant, being claimed in June, 1863, at the time of the Baca selection, and for many years thereafter, and having been granted by Mexico long prior to the treaties of 1848 and 1853, were reserved by section 8 of the act of July 22, 1854, from sale or other disposal until final action of Congress thereon, and were not vacant within the meaning of the act of 1860; that Congress having expressly reserved these lands in 1854, to carry out treaty obligations, could not have intended, and did not intend, by the act of 1860, to permit the Baca heirs to select lands then

claimed by Mexican citizens or their grantees; that the Commissioner of the General Land Office, by the letter of April 9, 1864, ordering a survey, did not have the power or jurisdiction to permit the heirs of Baca to do a thing forbidden by Congress, namely, to permit the Baca heirs to take lands that Congress had reserved for other purposes. As the right of the Baca claimants to select lands was limited to three years, and as during the whole of that period these lands were reserved, they could not initiate a title thereto. After the time of the Baca heirs to select had expired it mattered not what was the ultimate determination of Congress as to the validity of the claims. As matter of fact, one grant within the float was held valid; the other not; both were alike reserved until this determination.

It is clear that the land officers in New Mexico, including the surveyor-general, knew nothing, at the dates of their certificates, in regard to the land in question, and nothing of the Mexican private land claims, and the same is true of Commissioner Edmunds, when he ordered the survey in 1864. Those were facts that would have been discovered upon survey. The Commissioner doubtless knew that Mexican private land claims existed in the Gadsden purchase and that they were reserved under the act of 1854. It is not to be presumed that the Commissioner, by ordering survey, intended to do or did an act beyond his jurisdiction; it is not to be presumed that he intended or attempted to pass title to land expressly reserved by Congress. Certainly whatever construction may be given the letter of April 9, 1864, it cannot be argued that the Commissioner would have been precluded, when the survey was returned, showing the private land grants, from excluding therefrom the lands that Congress had expressly reserved.

It may well be that the prime motive that induced the Baca claimants to change the location of 1863, which covered the private land claims, to the location of 1866, which did not, was recognition by them that they could not take the lands under the Mexican claims.

It was after the Baca claimants had relocated the "float," in 1863, and while they were claiming the new location, and after the Calabasas grant had been held invalid, that the settlers and homesteaders took up their lands and changed a wilderness to a garden spot.

Respectfully submitted,

WILLIAM C. PRENTISS.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 889.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF GENERAL LAND OFFICE, APPELLANTS,

vs.

CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., JOHN WATTS, AND JAMES W. VROOM, APPELLEES.

SUPPLEMENTAL BRIEF.

Counsel for the Appellants seem to think (Brief, pp. 71-74) that there is a disposition among counsel for the Appellees to bring into this case a question as to which of the Appellees have the title or the better title to the land in the case at bar.

All of the counsel for the Appellees disclaim any such intention, and state, in the language of the decree, "that the plaintiffs herein or some of them

have shown sufficient title in themselves to said land to enable them to maintain this suit" (Rec., p. 309). None of the counsel for the Appellees seeks or desires any expression from the Court as to the relative rights of the Appellees, as there is no such question in the case.

HERBERT NOBLE,
J. W. BAILEY,
JAMES W. VROOM,
G. H. BREVILLIER,
All the Counsel for Appellees.